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SELECTION

OF

PRECEDENTS,

FROM

MODERN MANUSCRIPT COLLECTIONS,

AND

Drafts of Actual Practice;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

BY THE LATE

W. M. BYTHEWOOD, Esq.

AND

THOMAS JARMAN, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW

The Third Edition,

By GEORGE SWEET, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

VOLUME I.

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PREFACE.

In presenting the following Work to the Profession, it may appear unnecessary to state, that the greater part of the Precedents were drawn by Counsel of the greatest eminence, because the superior excellence of the generality of the Forms must be manifest to any person in the least acquainted with the subject;—the Precedents, the Variations, and the Notes added by myself, will, I hope, be received with candour. It would have given me pleasure to have inserted, in every instance, the name of the gentleman, by whom each instrument was drawn; but, as many of them are still living, it has been omitted altogether.

The great advantage of this Collection must be evident; because, with a very few exceptions of some short general Forms, the Precedents were drafts really drawn and used in the course of practice, and consequently may be regarded as the present method of Conveyancing.

I beg leave most respectfully to return my thanks to those Counsel and Solicitors, who have, with a liberality which peculiarly distinguishes Gentlemen

of the Law, kindly and spontaneously lent me their extensive Manuscript Collections of Precedents and Drafts of Deeds.

The whole of this Work was originally intended to be published at once, and several heads of it have been for some time entirely perfected; but in consequence of the determination to publish it in Parts, when little preparation had been made for those heads, which, under the present arrangement, make the commencement, the publication has been unavoidably delayed. However, from the forward state of the manuscript, I have the satisfaction to say, that one of the succeeding Parts will appear about every two months, until the whole be completed.

Occasionally, where it was thought that parts of the Precedents might be omitted, without destroying the efficacy of the deed, they are included within crotchets, thus [ ]; but this rarely happens: the parts within parentheses, thus ( ), are adapted to alternative circumstances (*a*).

On searching for any Form, the INDEX to the PRECEDENTS should invariably be consulted; because, although the Precedent sought for may not appear in the Table of Contents as a distinct instrument, yet in almost every instance it will be found as a part

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(*a*) [In the progress of the Work the course has been to inclose within crotchets matter which is *additional*, whether it relates to circumstances not necessarily included in the scope of the instrument, or is merely surplusage; while matter which is *substitutionary*, is placed within parentheses.]

of some other deed; so that a person of common experience may, from this collection, easily draw any instrument in conveyancing.

At the end of the Work, it is my intention to supply such information on the Principles and Practice of Conveyancing as may not have been previously included in the Annotations; and to give extracts from all the statutes in force relative to stamps on Deeds, &c., together with the decisions of the Courts of Law and Equity thereon.

From persons whose profession renders them so competent to appreciate the labour of selecting from many hundred Drafts, and voluminous Manuscript Collections of Precedents, and supplying Annotations on such a variety of subjects, I hope for indulgence for any errors I may have committed; because they will be sensible of the difficulties I have had to encounter.

W. M. BYTHEWOOD.

4, *Gray's Inn Square*,
August, 1821.

PREFACE

TO THE

SECOND EDITION.

THE Second Edition of Mr. Bythewood's System of Conveyancing now offered to the Profession, contains the late Editor's last corrections; and also several additional Precedents and Notes by the present Editor. The head "Annuity," in particular, required, and has received, considerable extension, in consequence of the recent Acts of Parliament, and the numerous adjudications on the subject since the former edition. The additional Precedents and Notes are distinguished by being placed within brackets: the former will be found in pp. 7, 99, 110, 329, 329 *f*, 329 *g*. Where the present Editor has merely corrected the phraseology of the Precedents, he has deemed it not worth while to notice the alteration. In connection with the new Precedents, in pages 329, 329 *f*, 329 *g*, insertion has been given to an abstract of the late salutary Act, introduced into Parliament by Lord Tenterden, making a writing necessary to the validity of certain promises and

agreements, and thereby remedying the mischief which had arisen from the encroachments made by judicial determinations upon the provisions of the Statutes of Limitations and Frauds.

THOMAS JARMAN.

6, *Pump Court, Temple,*
29 *Nov.* 1828.

ADVERTISEMENT

TO THE

THIRD EDITION.

MR. BYTHEWOOD, the original Editor of this collection, lived only to produce that portion of it which is comprised in the first three Volumes of the present edition. Mr. Jarman completed the Work, and also gave to the Profession a new edition of the first seven volumes; but, in consequence of the great interval of time which elapsed between the publication of the earlier and the later Volumes, the latter were scarcely out of print before a third edition of the former was required. The present impression, therefore, though called the third, is but the second edition, so far as concerns the last three Volumes.

In the first three Volumes, the text, where it is undistinguished by any mark, belongs to Mr. Bythewood; and Mr. Jarman's additions are denoted by crotchets with a J.,— [J. J.]. In the subsequent Volumes, matter which has been transferred from Mr. Bythewood's part of the Work is inclosed within braces, — { }; and my own additions throughout the Work are marked by plain crotchets.

In revising the first three Volumes, I have found

it necessary to take considerable liberties with the text, which, in many instances, was quite behind the present state of the law and practice. In particular, the space assigned in the former Editions to Precedents of Annuity Deeds far exceeded that which their importance is now entitled to claim.

The new title of ABSTRACTS has enabled me to discuss the recent Statutes of Limitation and Inheritance, which could not have been so conveniently introduced under any other head; but the Subscribers' urgent demands for the completion of the Work have prevented my going so fully into those topics, or into the very important subject of parol testimony with reference to Agreements, as I had wished.

GEORGE SWEET.

Southampton Buildings,
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ABSTRACTS.

PRELIMINARY DISSERTATION.

1. *Statutes of Limitations*, 1.—*Limitation against the Crown*, 52.—*Limitation of Claims to Tithes*, 54.—*Commencement of the Abstract*, 59.
2. *Contents of the Abstract*, 75.—*Arrangement and Form of the Abstract*, 87.
3. *Verification of the Abstract*, 98.—*Search for Incumbrances*, 104.—*Recitals*, 121.—*Evidence of Title by Descent.—Old and New Law of Descent*, 124.—*Disabilities of Aliens, &c.*, 149.—*Evidence admitted in Matters of Pedigree*, 157.—*Proof of Written Documents*, 168.—*Evidence in other Matters*, 181.

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1. The commencement of the abstract—statutes of limitations.

STATUTE OF LIMITATIONS.

[It is proposed to introduce in this place a general view of the operation of the recent Statute of Limitations, respecting the effect of which upon the length of abstracts so much discussion has arisen. To enable us to ascertain the effect of the recent statute, it will be necessary first to consider how the law stood before it was passed.]

[The rightful seisin of an estate of freehold may be interrupted in various ways, which are all included in the general terms of *disseisin* or *deforcement*. Disseisin also bears the special meaning of an eviction of a freeholder in possession; and deforcement, that of a wrongful holding over, after the determination of a rightful possession. The other varieties of disseisin are, abatement, which is a wrongful entry against an heir, upon the vacant possession after the death of the owner of the fee; and intrusion, which is a similar entry against a remainderman or reversioner, upon the death of the particular tenant. There was also a disseisin of a remainderman

Disseisin or deforcement.

Abatement.

Intrusion.

STATUTE OF LIMITATIONS.
Disseisin.

or reversioner, by tortious alienation, where the particular tenant conveyed the fee by feoffment, which amounted to a forfeiture of his own estate, and, by reason of the privity and confidence between him and the reversioner, and the solemnity of the conveyance, disseised the reversioner. With respect to the circumstances which were essential to constitute a disseisin of this kind, or a disseisin by deforcement, the doctrines of disseisin at election, and tenancy at sufferance, have introduced considerable uncertainty (*a*). (See

Disseisin at election.

(*a*) [In the case of *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 60, Lord *Mansfield* observed, that "the precise definition of what constituted a disseisin which made the disseisor the tenant to the demandant's præcipe, though the right owner's entry was not taken away, was once well known, but is not now to be found. The more we read—unless we are very careful to distinguish—the more we shall be confounded. For after the assize of novel disseisin was introduced, the legislature, by many acts of Parliament, and the Courts of law, by liberal constructions in furtherance of justice, extended this remedy for the sake of the owner to every trespass or injury done to his real property, if by bringing his assize he thought fit to admit himself disseised. It lay against advisers, aiders, or abettors, who were not tenants. Co. Lit. 180. b. It lay against the tenant who was no disseisor, as, the heir of a disseisor, or his feoffee. Stat. Gloucester. It lay for the owner against the disseisor of the disseisor. The tenant's not being ready to pay a rent-seck when demanded was, for the benefit of the owner's remedy, a disseisin. Litt. §. 233. It lay for outrageous distress. 2 Inst. 412. It lay against guardian or particular tenant who made a feoffment, as well as against their feoffees. 2 Inst. 413. The stat. West. 2, c. 25, extends to a man's depasturing the ground of another, or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseisor. Style, 407. If a guardian assigns dower to a woman not dowable, the owner may elect, to make her a disseiseress. 2 Edw. 3, c. 43, (cited in Cro. Car. 203). In a word, for the sake of the remedy, as between the true owner and the wrong doer—to punish the wrong, and as between the true owner and the wicked possessor—to try the title, the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments. The reports of assize can only relate to cases where the owner admits himself disseised. The law books treat of disseisin with a view to the assize, which was the common method of trying titles till ejectment came into use. Littleton, who wrote long after the remedy by assize was enlarged by statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser, or possessor, with an eye to the remedy by assize. These are the common places from whence many descriptions have been cited of a disseisin. But such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant and freeholder *de facto*, in spite of the true owner." "Except the special case of fines with proclamations, (which stands upon entirely distinct grounds), and the construction of the stat. of 4 H. 7, c. 24. for the sake of the bar, I cannot think of a case where the true owner, whose entry is not taken away, may not elect (by preserving a possessory remedy) to be deemed as not having been disseised. The consequences of actual disseisin, considered as such, continue law to this day. The disseisee cannot dispose or devise: the descent takes away his entry. There are two cases cited in the

Taylor d. *Atkyns* v. *Horde*, 1 Burr. 60; 5 B. P. C. 247: and *Doe* d. *Maddock* v. *Lynes*, 5 Dowl. & R. 161; *infra* Vol. 4, p. 48; and Co. Litt. 330. b., Butler's note).] STATUTE OF LIMITATIONS.

[A disseisin put the true owner to his entry. A right of entry, upon which ejectment may be brought was formerly capable of being barred by the effect of a descent-cast—a discontinuance—or a warranty. The effect of a warranty has been noticed elsewhere, (*infra*, Vol. 4, p. 4). A descent-cast was the defeating of the right of entry of a person who had been disseised, by the death of the disseisor in possession, and the descent of the estate upon his heir —and this effect took place, however quickly the descent followed the disseisin, except where the disseisin was by eviction,—in which case, the stat. 32 Hen. 8, c. 33, made five years' quiet possession by the disseisor necessary before a descent could toll the disseisee's right of entry. The effect might also have been prevented by a formal claim upon or in view of the land, within the year in which the descent happened; and even that was unnecessary to save the right, where the true owner was under disability, or where the disseisor, being a relation, claimed as heir, or where the effect of

Rights of entry, how formerly lost.

Warranty.

Descent-cast.

case of *Blunden* v. *Baugh*, Cr. Car. 303, material to this point. *Pousley* v. *Blackman*, B. R. Trin. 18 Jac. Rot. 1230; Palmer 201, which is more fully stated in the MS. report than in Croke, [Cro. Jac. 659,] was this: Tenant at will made a lease for years: the original lessor devised. Though the lease, at the election of the lessor was a disseisin, yet they adjudged his devise good; because he had not elected to admit himself disseised, and by making a will, intimated the contrary. Another case (not in the Report in Cro. Jac., but cited in the MS.), was in the 13 Eliz. Sir Ambrose Cone, of his own head, entered into the lands of Sir William Hollis, and paid Sir William, afterwards, a certain rent, claiming to hold as tenant at will, and died. His heir entered; upon which Sir William entered. It was adjudged, 'that at the election of Sir William, Sir Ambrose was a disseisee; but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was no disseisin, and, consequently, the descent was no bar to his entry.'"]

[In both of the cases last cited in the above extract, the party wrongfully in possession made no claim to the freehold, and therefore could not be treated as a disseisor, unless at the election of the owner; but whenever a party is wrongfully in possession, *claiming the freehold*, (and where no different claim is made, a claim to the freehold will generally be presumed), that is a disseisin. See *Rex* v. *Axbridge*, 4 Nev. & M. 477: *Doe* d. *Roffey* v. *Harbrough*, 1 Nev. & M. 422: *Smith* d. *Dennison* v. *King*, 16 East, 283: *Roe* d. *Pellatt* v. *Ferrars*, 2 Bos. & P. 542: *Doe* d. *Human* v. *Pettett*, 5 B. & Al. 223: *Hall* v. *Doe* d. *Surtees*, 1 Dow. & Ry. 340; 5 B. & Al. 687: *Doe* d. *Grubb* v. *Grubb*, 10 B. & Cr. 816: *Doe* d. *Burrell* v. *Perkins*, 3 Mau. & S. 271: *Williams* v. *Thomas*, 12 East, 141; and see Watk. Conv. by Morley & Coote, p. 25. The inquiry is of very little importance now that fines and recoveries are disused, and the bar under the Statute of Limitations no longer depends upon disseisin.]

STATUTE OF LIMITATIONS.

tolling the right of entry would have been to deprive the true owner of all remedy,—as, if he claimed under a condition broken, or a will,—and so could not bring a real action. *Matheson* v. *Trot*, 1 Leon. 209, (the decision in which case is erroneously stated by Lord Mansfield, in *Taylor* d. *Atkyns* v. *Horde*, Burr. 65).]

Discontinuance.

[Discontinuance was a tortious alienation of the fee by a tenant in tail in possession, by a bishop, &c., seised in right of his church, by a husband seised in right of his wife, or by a widow seised of an estate in dower; but since the stats. 11 Hen. 7, c. 20; 32 Hen. 8, c. 28; 1 El. c. 19; 13 El. c. 20; and 1 Jac. 1, c. 3, it did not, in the two latter cases, destroy the right of entry of the next claimant. If a tenant in tail, having been disseised, released his right to the disseisor, with a warranty binding his heirs, the effect of a discontinuance was also produced against all such of the heirs in tail of the party who made the warranty, as answered also to the description of his heirs general: such heirs in tail, being deprived by the warranty of their right of entry, were put to their formedon.]

Stat. of Limitations, 21 Jac. 1, c. 16.

[The true owner also lost his right of entry if he did not prosecute his claim within the period prescribed by the stat. 21 Jac. 1, c. 16, of which the first section, after limiting the period for bringing writs of formedon *in descender*, *remainder*, or *reverter* (*b*), to twenty years "next after the title and cause of action first descended or fallen," enacted, that "no person or persons shall at any time hereafter *make any entry* into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title which shall hereafter first descend or accrue to the same, and in default thereof, such persons so not entering shall be utterly excluded and disabled from such entry after to be made." The second section contained provisions for disabilities, which are not material to our purpose. See *Doe* d. *George* v. *Jesson*, 6 East, 80: *Cotterell* v. *Dutton*, 4 Taunt. 826.]

Real actions.

[After the right of entry was lost, the true owner still retained, in most cases, a right of action, which was either possessory, as were all writs of *entry* and *assize*, or droitural, to which belonged the writ of *right* and its varieties. (See Com. Dig. *Assize*, *Droit*, and the table, tit. *Action*). In all these, the demandant was required to prove a former seisin, either in himself, or in the ancestor or other person from whom he derived his title. It was sufficient for a remainderman or reversioner, or the assignee of such, to

(*b*) [The issue in tail were thus entirely barred under this statute, and had not, as was at one time supposed, successive rights. *Tolson* v. *Kaye*, 6 J. B. Moore, 542: 3 Br. & B. 217: *Cotterell* v. *Dutton*, 4 Taunt. 826.]

STATUTE OF LIMITATIONS.

allege a seisin in the settlor, and in some person entitled under the settlement. Fitzh. N. B. 204, &c. And under a writ of dower, it was not necessary to allege any seisin. But it was not competent for a person claiming under a devise, either executory or in possession, to sue upon the seisin of the devisor; and, therefore, if he had never entered under the devise, he could not (except in case of land devisable by custom, F. N. B. 199) recover in a real action. And a devisee in remainder was in the same situation, until entry by the particular devisee. Whether the seisin conferred by the Statute of Uses was a sufficient foundation for a real action, without actual entry, does not seem to have been decided. See Cro. Jac. 604.]

Stat. 32 Hen. 8, c. 2. Limitation of time for bringing real actions.

[The time for enforcing these rights of action was limited by the statute 32 Hen. 8, c. 2, in case the action was founded on the demandant's own seisin, to thirty years (sec. 3); in case it was founded on the seisin of the demandant's ancestor or predecessor, to sixty years, if it were a droitural action, and to fifty years, if it were a possessory action, (ss. 1, 2, 6). By sect. 4, no avowry or conusance could be made for any rent, suit, or service, after fifty years from the seisin upon which the claim was founded. The time for making a prescription was also, by the first section, limited to sixty years. Real actions by remaindermen and assignees of reversions, were not within the letter of the statute of Hen. 8, (for the word "predecessor" was considered to refer exclusively to corporations sole), but they were held to be within its spirit; and it was further laid down, that the statute in such cases limited the remedy to a period of fifty years from the seisin of the settlor, and not thirty from that of the tenant for life,—so that, if the tenant for life lived more than thirty years after the making of the settlement, the remainderman's remedy by ejectment might have subsisted (even subsequently to the statute of James I.) after his right of action had been barred. *Widdowson* v. *Earl of Harrington*, 1 Jac. & W. 532: *Piercy*, dem., *Gardner*, ten., 4 Scott, 512. Both of the above-mentioned statutes extended to lands of copyhold tenure. *Widdowson* v. *Earl of Harrington*.]

Remaindermen and assignees of reversions.

Stat. 4 Hen. 7, c. 24. Bar by fine and non-claim.

[The disturbances of the civil wars, and the consequent necessity of quieting titles, led to the passing of the Statute of Fines, 4 Hen. 7, c. 24, the arbitrary provisions of which long survived the peculiar circumstances by which alone they were justifiable. That statute gave to a fine with proclamations levied by a person in possession, either rightfully or otherwise, of an estate of freehold, the effect of barring the rights of all persons having present rights of entry, and not being under disability, if they did not claim within five years after the last proclamation; and it barred

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Fine and non-claim.

all persons under disabilities when the fine was levied, if they did not claim within five years after their disabilities were removed; and all persons not having present rights, if they did not claim within five years after their rights of entry accrued—unless they were under disabilities—and then within five years after such disabilities had ceased; or unless, in any of these cases, an entry or claim was made within the period. And the entry or claim to exclude the bar under the above act, or under the statute of James I., was required, by the stat. 4 Anne, c. 16, s. 16, to be followed up within the year by an action. The provision for disabilities in the Statute of Fines, was held not to extend to *successive* disabilities. *Dillon* v. *Leman*, 2 H. Bl. 584.]

Stat. 4 Anne, c. 16. Entry or claim to preserve rights.

[Questions upon the effect of a fine and nonclaim may still arise, in which the material inquiry will generally be, whether the party levying the fine had at the time an estate of freehold in the land, —acquired either rightfully or by some one of the general modes of disseisin above mentioned—for if he were not in possession at all, or in possession as tenant at sufferance, or for any other merely chattel interest, the fine would be inoperative, as having been levied by a stranger to the freehold. See *Davies* v. *Lowndes*, 7 Scott, 21: *Doe* d. *Burrell* v. *Perkins*, 3 Mau. & Sel. 271: *Carter* v. *Barnardiston*, 1 P. Wms. 505, and *ante*, p. 2, n.]

Obsolete Statutes of Limitation.

[Other statutes respecting limitations, which are now obsolete, are the stat. 1 Mary, st. 2, c. 5, (relating to advowsons); 10 & 11 Will. 3, c. 14, (writ of error for reversing a fine, recovery, or judgment); 7 Anne, c. 18, (advowsons); and 14 Geo. 3, c. 20, (loss of recovery deed or record; *infra*, p. 171).]

Adverse possession under the stat. 21 Jac. 1, c. 16.

[Actual seisin, it has been seen, was essential to the operation of a fine as a bar; and, upon principle, it should seem that there could have been no *adverse possession* sufficient to bar the true owner's entry under the Statute of Limitations of Jac. 1, unless he was actually disseised, and the party in possession, therefore, seised in such manner as would have been sufficient support to a fine levied by him. Unless the true owner was dispossessed of his *freehold*, there could be no adverse possession of it against him. Accordingly in *Reading* v. *Rawsterne*, 2 Lord Raym. 829; 1 Salk. 242, it was held, that "the Statute of Limitations does not bar a man, but where there is an actual disseising;" *S. C. nom. Redding* v. *Royston*, 1 Com. R. 123. See *Doe* d. *Dunraven* v. *Williams*, 7 Car. & P. 332; *Hodgkinson* v. *Fletcher*, 3 Doug. 31. In the case of *Doe* d. *Parker* v. *Gregory*, 4 Nev. & M. 308, however, the law was stated otherwise. In that case, T. Rogers devised to N. T. Rogers

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Adverse possession.

for life, with power to jointure, remainder to W. Rogers in tail male, remainder to his own right heirs. N. T. Rogers, when in possession, appointed the estate to Mary his wife for life by way of jointure, who, upon her husband's death, entered into possession, and married C. Vale, levied a fine of part of the premises, and died in 1812. Vale continued in possession until his death in 1832; and from that time until the action was brought on behalf of the heirs of T. Rogers, the settlor, the defendant had been in possession. Before 1812, W. Rogers, the remainderman in tail, died without issue inheritable under the entail. *Doe* d. *Burrell* v. *Perkins* was cited to shew that C. Vale's possession was not adverse; but Lord *Denman*, C. J., in delivering the judgment of the Court said—"Vale came in originally in his wife's right, and had not directly ousted the rightful owner, but merely continued where he was, to the exclusion of that owner. A case of *Reading* v. *Rawsterne*, was mentioned, but in that case, though an actual disseisin is declared necessary, these words must be taken with reference to the subject matter, and are there contradistinguished from the mere perception of rents and profits in the case of joint tenants. But in *Doe* d. *Burrell* v. *Perkins*, (3 Mau. & Sel. 271), the Court was of opinion, that a fine levied by a person who was in possession under the same circumstances as the defendant here operated nothing, because he came in by title (*c*), and had no freehold by disseisin; and it was argued, that here Vale was also to be considered as having entered rightfully, and as having committed no disseisin. We are, however, of opinion, that this may be so *for the purpose of avoiding a fine*, it cannot prevent Vale's possession from being *wrongful* from the very hour when his interest expired by his wife's death. It is clear, that he might have been immediately turned out by ejectment (*d*). We

(*c*) [Tenancy at sufferance, however, does not arise in all cases of holding over after a rightful holding has determined, but only when the rightful holding commenced by act *inter vivos*. Where the party originally came in *by act of law*, his holding over is a deforcement. "A tenant at sufferance is he that at the first came in *by lawful demise*, and after his estate ended continueth in possession, and wrongfully holdeth over." "But there is a diversity between particular estates made by the terre-tenant as above is said, and particular estates created by act in law: as, if a guardian, after the full age of the heir, continueth in possession, *he is no tenant at sufferance, but an abator*, against whom an assize of *mort' d' ancestor* doth lie. *Et sic de similibus.*" Co. Litt. 576. "*And if guardian in such case dies seised, the entry of the heir tolls.*" Hale, n., ib.]

(*d*) [Every tenant at sufferance may be turned out by ejectment, without previous demand of possession, (*infra*, Vol. 5, p. 351), although, until such demand, he cannot be treated as a trespasser. The liability to ejectment, without notice, therefore is no criterion of a *wrongful* possession. See Co. Litt. 57, b.]

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Adverse possession.

think, therefore, that the continuing of this possession by Vale and the defendant, for twenty years, entitles the defendant to the protection of the Statute of Limitations."]

[It is difficult to conceive how there can be any intermediate kind of possession between a possession by sufferance, and a possession altogether adverse to the title of the true owner of the freehold, and therefore, amounting to a possession of the fee, according to the old doctrine, that there can be no particular estate gained by wrong, (see *Doe* d. *Human* v. *Pettett*, 5 Barn. & Al. 223); and yet, some such intermediate kind of possession must be admitted, if the distinction taken in the above case is to be supported. The point, however, is now of little importance, in consequence of the great change that has been introduced by the statute 3 & 4 Will. 4, c. 27, intituled, "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," which is as follows:—

Stat. 3 & 4 Will. 4, c. 27, Royal assent, July 24, 1833.

Meaning of the words in the act:—

[Sect. 1, enacts, "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows, (that is to say), the word '*land*' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to *tithes* (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word '*rent*' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole) (*e*), and *the person through whom another person is said to claim* shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as *heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise,* and also any person who was entitled to an estate or interest to which the person so claiming, or

"Land."

"Rent."

Person through whom another claims.

Turnpike tolls.

e) [Tolls payable in respect of a turnpike road are neither land nor money charged upon or payable out of land, and therefore, are not within the statute. *Mellish* v. *Brooks*, 3 Beav. 22.]

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some person through whom he claims, became entitled as lord by *escheat;* and the word '*persons*' shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual (*f*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

"Person."

Number and gender.

Sect. 2. "That, after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry (*g*) or distress, or bring an action to recover any land or rent *but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims,* or, if such right shall not have accrued to any person through whom he claims, *then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same* (*h*).

Time of Limitation:—No land or rent to be recovered but within twenty years after the right of action accrued to the claimant or some person whose estate he claims.

Sect. 3. "That, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, (that is to say), when the person claiming such land or rent, or some person through whom he claims, shall in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued *at the time of such dispossession or discontinuance of possession* or *at the last time at which any such profits or rent were or was so received;* And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time of such death;* And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or

When the right shall be deemed to have accrued:—

1. Where estate once in possession;

2. in case of abatement;

3. alienation *inter vivos.*

(*f*) [*Vide infra*, p. 22; and as to spiritual or eleemosynary corporations sole, see sect. 29.]

(*g*) [See *Holmes* v. *Newlands*, 3 Per. & D. 128; 11 Ad. & Ellis, 44.]

(*h*) [As to mortgages, *vide* stat. 7 Will. 4 & 1 Vict. c. 28, stated *infra*, p. 25.]

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otherwise assured by *any instrument* (*other than a will*) to him, or some person through whom he claims, by a person being, *in respect of the same estate or interest*, in the possession or receipt of the profits of the land, or in the receipt of the rent (*h*), and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time at which the person claiming as aforesaid* or *the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;* And when the estate or interest claimed shall have been an estate or interest in reversion or remainder (*i*), or other future estate or interest (*h*), and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued *at the time at which such estate or interest became an estate or interest in possession* (*k*); And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition (*l*), then such right shall be deemed to have first accrued *when such forfeiture was incurred*, or *such condition was broken*."

4. future estates;

5. forfeiture or breach of condition.

Forfeiture:— Where advantage of forfeiture is not taken by reversioner or remainderman, he shall have a new right when his estate comes into possession.

Sect. 4 provides, "That, when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

Reversioner:— Reversioner to have a new right, on termination of particular estate, though previously in possession.

Sect. 5 provides, "That a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or

(*h*) [See *James* v. *Salter*, 4 Scott, 180, *infra*, p. 42.]

(*i*) [*Doe* d. *Davy* v. *Oxenham*, 7 M. & W. 133.]

(*k*) [See *Earl of Bandon* v. *Becher*, 3 Cl. & Fin. 479.]

(*l*) [See *Whitton* v. *Peacock* Myl. & K. 325.]

estates, which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

Administrator; —Administrator to claim as if no interval occurred between death and grant of letters of administration.

Sect. 6. "That, *for the purposes of this act*, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration." (*m*)

Tenancy at wilt: — Right of party entitled subject to a tenancy at will shall be deemed to have accrued at the determination of the tenancy, or at the end of one year from its commencement.

Sect. 7. "That, when any person *shall be* in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, *at which time such tenancy shall be deemed to have determined.* Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

Yearly tenancy: —Right of party entitled subject to a tenancy from year to year, shall be deemed to have accrued at the end of the first year or last payment of rent.

Sect. 8. "That, when any person *shall be* in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year *or other period, without any lease in writing*, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen.")

Lease:—Where rent amounting to 20*s.* reserved

Sect. 9. "That when any person *shall be* in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly

(*m*) [Previously to this enactment, the rule was, that time did not run against an administrator, except from the period of the grant of the letters of administration; and therefore in an action by an administrator upon a bill of exchange, payable to the intestate, but accepted after his death, it was held, that the Statute of Limitations began to run from the time of the granting of the letters of administration, and not from the maturity of the bill, there being no cause of action until there was a party capable of suing. *Murray* v. *East India Company*, 5 B. & Al. 204. There was in the statute of James no saving in cases where there was no party to be sued.]

[Where the defendant is beyond seas, the stat. 4 & 5 Anne, c. 16, s. 19, saves the right of the plaintiff until the defendant's return. Ireland is still a place beyond seas within that act. *Lane* v. *Bennet*, 1 Mee. & Welsb. 70; *vide infra*, p. 25 n. As to the remedy where there is a delay in the appointment of a personal representative of the debtor, see *Rhodes* v. *Smethurst*, 4 M.&W.42.]

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by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received *by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease,* and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid: and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled." (*m*)

Entry:—A mere entry not to be deemed possession.

Sect. 10. "That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon." (*n*)

Continual claim:—No right to be preserved by continual claim.

Sect. 11. "That no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action." (*o*)

Coparceners, &c.:—Possession of one coparcener, &c., not to be the possession of the others.

Sect. 12. "That, when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other that the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them." (*p*)

Younger brother, &c.:—Possession of a younger brother, &c., not to be the possession of the heir.

Sect. 13. "That, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, *shall enter* into the possession or receipt thereof, such possession or receipt shall not be

(*m*) [See *Doe* d. *Cook* v. *Danvers*, 7 East, 299; Gilb. Ten. 97.]

(*n*) [*Doe* d. *Bennett* v. *Turner*, 7 M. & W. 229.]

(*o*) [*Hodle* v. *Healey*, 1 Ves. & B. 540; *Anon.* 2 Atk. 15.]

(*p*) [See Co. Litt. 243. b., 373. b.: as to presuming or admitting ouster of a tenant in common, see *Doe* d. *Fisher*, v. *Prosser*, Cowp. 217: *Doe* d. *Gill* v. *Pearson*, 6 East, 173: *Doe* d. *Hellings* v. *Bird*, 11 East, 49: *Doe* d. *White* v. *Cutt*, 1 Camp. 773: *Ex parte Hasell, re Manchester Gas Act*, 3 You. & C. 617: *Davenport* v. *Tyrrell*, 1 W. Bl. 675; *Fairclaim* d. *Empson* v. *Shackleton*, 3 Burr. 2604; 2 W. Bl. 690.]

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deemed to be the possession or receipt of or by the person entitled as heir." (*q*)

Acknowledgment of title; —Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent at that time.

Sect. 14 provides, "That, when any acknowledgment of the title of the person entitled to any land or rent shall have been given *to him or his agent*, in writing, *signed by the person in possession* or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same; and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given." (*r*)

Possession not adverse when act passed:— Where possession was not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

Sect. 15 provides, "That, when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall *not at the time of the passing of this act* have been *adverse* to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this act." (*s*)

Disabilities:— When person first entitled is

Sect. 16 provides, "That, if at the time at which the right of any person to make an entry or distress, or bring an action to reco-

(*q*) [See Co. Litt. 242. a; Gilb. Ten. 28: *Sharington* v. *Straton*, Plowd. 300: *Doe* d. *Warren* v. *Horn*, 3 Mee. & W. 333: *Doe* d. *Draper* v. *Lawley*, 3 Nev. & M. 331: *Ex parte Hasell*, 3 You. & C. 617.]

(*r*) [An acknowledgment signed by the agent of the person in possession would not be sufficient. The construction of a doubtful document, given in evidence as an acknowledgment to defeat the Statute of Limitations, is for the court and not for the jury. *Morrell* v. *Frith*, 3 Mee. & Welsb. 402; *Doe* d. *Curzon* v. *Edmonds*, 6 Mee. & Welsb. 295. In the latter case the following words, (which were not acted upon), were considered not to amount to an acknowledgment of title within the above section:—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises; yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years." As to the admissibility of parol evidence under Lord Tenterden's Act, where the written acknowledgment had been lost, see *Haydon* v. *Williams*, 4 Moo. & Pay. 811; *Edmunds* v. *Downes*, 2 Cr. & Mees. 459.]

(*s*) [See *Holmes* v. *Newland*, 3 Nev. & P. 128: *Ex parte Hasell*, 3 You. & C. 617: *Doe* d. *Burgess* v. *Thompson*,

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infant coverte, lunatic, or beyond seas, ten years to be allowed from the termination of the disability or death.

ver any land or rent, shall have *first accrued* as aforesaid, *such person* shall have been under any of the disabilities hereinafter mentioned, (that is to say), infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which *the person to whom such right shall have first accrued* as aforesaid, shall have ceased to be under any such disability, or shall have died (which shall have first happened"). (*u*)

But no action &c. shall be brought beyond *forty years* after the right accrued.

Sect. 17, provides, " That no entry, distress, or action, shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, *shall have* first accrued, *shall be* under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired." (*x*)

Successive disabilities;—No further time to be allowed for a succession of disabilities.

Sect. 18, provides, " That, when any person *shall be* under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have

1 Nev. & Per. 215; 5 Adol. & El. 532: *Doe* d. *Jones* v. *Williams*, 5 Adol. & El. 291: 6 Nev. & Man. 816: *Doe* d. *Hickman* v. *Haselwood*, 1 Nev. & P. 352. As to pleading under this section, see *James* v. *Salter*, 2 Scott, 750.]

(*u*) [In personal actions a disability occurring after the time has commenced to run will not stop it. *Rhodes* v. *Smethurst*, 6 Mee. & Welsb. 351: see *Doe* d. *Duroure* v. *Jones*, 4 T. R. 800: *Predeux* v. *Webber*, 1 Lev. 314. The above clause, it will be observed, makes no allowance for a succession of disabilities in different persons; see, too, sect. 18; but of course a succession of disabilities in the same person, without any interval, (as for instance infancy succeeded by coverture contracted during infancy), will have the same effect as the continuance of the same disability].

(*x*) [The disability of one coparcener is no protection to the other. *Roe* v. *Langdon* v. *Rowlston*, 7 Taunt. 441.]

died, shall be allowed by reason of any disability of any other person." (*y*)

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Sect. 19. "That no part of the united kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), *shall be* deemed *to be* beyond seas within the meaning of this act." (*z*)

"Beyond seas:"—Scotland, Ireland, and the adjacent islands, not to be deemed beyond seas.

Sect. 20. "That, when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be (*a*) applicable in such case, and such person shall, *at any time during the said period*, have been entitled to *any other estate, interest, right or possibility, in reversion, remainder, or otherwise*, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

Concurrent rights:—When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred, unless another person recovers in respect of a mediate right.

Sect. 21. "That, when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action, shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred."

Estate tail:—Where tenant in tail is barred, those whom he might have barred shall not recover.

Sect. 22. "That, when a tenant in tail of any land or rent,

Possession ad-

(*y*) [This clause, like some others in the act, seems to have been introduced *ex abundanti cautelâ*; for the case against which it is directed is excluded by the wording of the 16th section.]

(*z*) [Where the controversy has arisen since the passing of the act the clause operates retrospectively and makes a residence in Ireland, &c., previous to the act no disability. *Ex parte Hasell, re Manchester Gas Act*, 3 You. & C. 617.]

[It may be here observed, that the use of the words "shall be" in some places, and "shall have been" in others, in this act, does not appear to have been intended to make any distinction as to their prospective or retrospective operation: excepting the case just cited, however, there has been no decision to that effect.]

(*a*) [The use of the words "shall be" in immediate connexion with the preceding words, "shall have been," may be thought to confirm the opinion already expressed as to the loose and convertible use of those words throughout this act. This is particularly apparent in the 23rd section.]

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verse to a tenant in tail shall be adverse to those whom he might have barred.

entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action." (*a*)

Defective assurance by tenant in tail:—Where there shall have been possession under an assurance by a tenant in tail, which shall not bar ulterior rights, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

Sect. 23. "That when a tenant in tail of any land or rent shall have made an assurance thereof, which *shall not* (*b*) operate to bar an estate or estates to take effect after or in defeasance of his estate tail and any person *shall*, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, *be* (*b*) in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which *such assurance*, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail."

Suits in equity:—No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have

Sect. 24. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or

(*a*) [Thus, where in 1788, the land was settled to the use of the wife for life, with remainder to her issue in tail, with remainder to the settlor in fee, and in 1818 the husband and wife and their only son joined in a recovery, under which the land was limited to the use of the husband for life, remainder to the wife for life, remainder to the son for life, remainder to the son's issue in tail, remainder to his sister for life, and the husband died in 1819, the wife in 1822, and the son in 1828; it was held that the sister had twenty years from the year 1822, (when the last tenant for life died), for bringing an ejectment against parties whose adverse possession commenced in 1794. *Doe* d. *Curzon* v. *Edmonds*, 6 M. & W. 295; see *Doe* d. *Baverstock* v. *Rolfe*, 3 Nev. & P. 648: *Bandon* v. *Becher*, 3 Cl. & Fin. 475.]

(*b*) See note (*a*), p. 15.

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brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity,"

brought an action.

Sect. 25, provides, "That, when any land or rent *shall be* vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him."

Express trusts: —In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser, and then only against such purchaser.

Sect. 26. "That, in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered; Provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed." *(c)*

Fraud:—In cases of fraud no time shall run whilst the fraud remains concealed.

Proviso for purchasers without notice.

Sect. 27, provides, "That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity, in *refusing* relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act." *(d)*

Acquiescence: —Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

Sect. 28. "That, when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee

Mortgagor:— Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or

(*c*) [See *Western* v. *Cartwright*, Sel. C. C. 34; *Bonney* v. *Ridgard*, 1 Cox, 145; *Cotterell* v. *Purchase*, Cas. tem. Talb. 63; *Bicknell* v. *Gough*, 3 Atk. 558; *Deloraine* v. *Brown*, 3 Br. C. C. 633; *Morse* v. *Royal*, 12 Ves. 374; *Byrne* v. *Frere*, 2 Molloy, 137. In cases of *mistake* time did not run until the discovery of the mistake. *Brooksbank* v. *Smith*, 2. You. & Col. 58. The statute has no saving for such cases.]

(*d*) [*Vide infra*, p. 47.]

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obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; And when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; But, where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; And where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage." (*e*)

from the last written acknowledgment.

Several mortgagors.

Several mortgagees.

Joint mortgagees.

Ecclesiastical and eleemosynary corporations sole:—

Sect. 29, provides, "That it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make any entry or

(*e*) [*Vide infra*, Vol. 5, p. 383. A mortgagee *defendant*, asserting his right, has been held not to be barred by the act. *Murphy* v. *Sterne*, 1 Drury & Walsh, 236. See note to sect. 40, *infra*, p. 22.]

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No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole, but within two incumbencies and six years, or within sixty years.

distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall have first accrued; (that is to say), the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the time of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and, if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period." (*f*)

Advowsons:— No advowson to be recovered after three adverse incumbencies, or sixty years.

Sect. 30. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say), the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and, if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years." (*g*)

(*f*) [Adverse possession was formerly a bar only to the rector or vicar against whom it had been enjoyed, not binding successors for however long a period it was continued. *Croft* v. *Howell*, Plowd. 538; Id. 375; *Barker* v. *Richardson*, 4 B. & Al. 579: *Runcorn* v. *Doe* d. *Cooper*, 5 B. & Cress. 696; 8 Dowl. & Ry. 450: *Allott* v. *Wilkinson*, 2 Eagl. & Y. 291.]

(*g*) [There was formerly no limitation of the right to an advowson, except the period of legal memory—the commencement of the reign of Richard I. The stat. 1 Mar. sess. 2, c. 5, declared that the stat. 32 Hen. 8, c. 2, did not extend to advowsons; and by the stat. 7 Anne, c. 18, it was enacted, that no usurpation should displace the estate or interest of any person entitled to an advowson; the object of which enactment was to enable the patron to proceed at once by *quare impedit*, without previously removing the effect of the usurpation by an assize or writ of right, as the case might be. See Co. Litt. 115. a.]

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Advowson—Lapse:—Incumbencies after lapse, to be reckoned within the period, but not incumbencies after promotions to bishoprics.

Sect. 31, provides, "That, when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but, when a clerk shall have been presented by his Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop."

Entailed advowson:—When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

Sect. 32. "That, in the construction of this act, every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit, shall be limited accordingly."

Advowson—Extreme period:—No advowson to be recovered after 100 years.

Sect. 33, provides, "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some persons through whom he claims, or of some person entitled in respect of an estate, share, or right, held or derived under the same title."

Extinction of right:—At the end of the period of limitation the right of the party out of possession to be extinguished.

Sect. 34. "That, at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the *right and title* of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be *extinguished*." (*h*)

(*h*) [A similar rule has existed for a long period in some of the West India Colonies. See *Beckford* v. *Wade*, 17 Ves. 87. The old statutes in England (with the exception of the Statute of Fines) barred the *remedy* only.]

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Sect. 35. "That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him, (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act."

Receipt of rent;—To be deemed receipt of profits as against lessees.

Sect. 36. "That no writ of right patent; writ of right *quia dominus remisit curiam;* writ of right *in capite;* writ of right in London; writ of right close; writ of right *de rationabili parte;* writ of right of advowson; writ of right upon disclaimer; writ *de rationabilibus divisis;* writ of right of ward; writ *de consuetudinibus et servitiis;* writ of *cessavit;* writ of *escheat;* writ of *quo jure;* writ of *secta ad molendinum;* writ *de essendo quietum de theolonio;* writ of *ne injuste vexes;* writ of *mesne;* writ of *quod permittat;* writ of *formedon in descender, in remainder,* or *in reverter;* writ of assize of *novel disseisin,* nuisance, *darrien-presentment juris utrum,* or *mort d'ancestor;* writ of entry *sur disseisin,* in the *quibus,* in the *per,* in the *per* and *cui,* or in the *post;* writ of entry *sur intrusion;* writ of entry *sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vitâ, sur cui in vita, cui ante divortium,* or *sur cui ante divortium;* writ of entry *sur abatement;* writ of entry *quare ejecit infra terminum,* or *ad terminum qui præteriit,* or *causa matrimonii prælocuti;* writ of *aiel, besaiel, tresaiel, cosinage,* or *nuper obiit;* writ of waste; writ of partition; writ of *disceit;* writ of *quod ei deforceat;* writ of covenant real; writ of *warrantia chartæ;* writ of *curia claudenda;* or writ *per quæ servitia;* and no other action real or mixed, (except a writ of right of dower or writ of dower *unde nihil habet,* or a *quare impedit,* or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for free-bench or dower) shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four."

Real and mixed actions abolished:—Real and mixed actions, &c., abolished after the 31st December, 1834;

except for dower and free-bench, *quare impedit,* and ejectment;

Sect. 37, provides, "That when, on the said thirty-first day of December, one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June, one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired."

Real actions may be brought until the 1st June, 1835, in certain cases.

Sect. 38, provides, "That when, on the said first day of June, one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent

Saving the rights of persons entitled to real actions on-

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ly, at the commencement of the act, &c.

cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June, one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away."

Descent cast, &c.:—No descent, warranty, &c., to bar a right of entry.

Sect. 39. "That no descent cast, discontinuance, or warranty, which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land." (*i*)

Charges and legacies:—Money charged upon land and legacies, to be deemed satisfied at the end of twenty years, if there should be no interest paid or acknowledgment given in writing in the mean time.

Sect. 40. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment (*k*), or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy (*l*), but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, *or his agent*, to the person entitled thereto, *or his agent* (*m*); and in such case no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given."

(*i*) [*Vide infra*, Vol. 4, p. 4. The effect of a descent cast as between a *bastard eigne* and *mulier puisne*, (2 Bl. Com. 248), seems to be thus taken away.]

(*k*) [See *Grenfell* v. *Girdlestone*, 2 You. & Coll. 662. In *Berrington* v. *Evans*, 1 You. & Coll. 435, it was held, that a judgment creditor's claim had not been kept alive by the subsistence of a creditor's suit, under which he had not proved during twenty years. "The statute says," observed the Lord Chief Baron, "that such a claim shall not be made after twenty years, unless in the mean time some part of the money, either principal, or interest thereon, shall have been paid, or some acknowledgment shall have been given in writing. These are the only exceptions mentioned in the act. Nothing is said of the case of a bill being filed by one creditor for the benefit of the rest, and I cannot engraft another exception on the act of Parliament." See as to judgments, *infra*, Vol. 5, pp. 63, 64 a, n.; and see *Murphy* v. *Stone*, 1 Drury & Walsh, 236; *Peyton* v. *M'Dermott*, Id. 211; *Ex parte Ross*, 2 Gl. & Ja. 46, 330; *Ex parte Healey*, *re Norris*, 1 Dea. & Ch. 361; *Sterndale* v. *Hankinson*, 1 Sim. 393.]

(*l*) [See *Smallman* v. *Lord Hamilton*, 2 Atk. 71: *Pickering* v. *Lord Stamford*, 2 Ves. jun. 581; and *infra*, p. 26.]

(*m*) [An acknowledgment, signed by

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Sect. 41. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit." (*n*)

Arrears of dower:—No arrears of dower to be recovered for more than six years.

Sect. 42. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three (*o*), no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, *or in respect of any legacy*, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years (*p*) next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, *or his agent*, signed by the person by whom the same was payable, *or his agent* (*m*): Provided, nevertheless, that, where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." (*q*)

Arrears of rent or interest:—No arrears of rent or interest to be recovered for more than six years.

Exception in case of prior incumbrances.

Sect. 43. "That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other propery, for the recovery of which he might

Spiritual Courts:—Act to extend to the spiritual courts.

an agent, is not sufficient under the stat. 9 Geo. 4, c. 14, s. 1; (*Hyde* v. *Johnson*, 3 Scott, 289); nor in cases regulated by the other sections of this act, except the 42nd. An acknowledgment of a debt by the agent of a trustee for payment of debts, is sufficient to keep alive the creditor's claim; and it need not state the amount due. (*Lord St. John* v. *Boughton*, 9 Sim. 219. See *Hargreaves* v. *Michell*, 6 Mad. 326).]

(*n*) [See *Oliva* v. *Richardson*, 9 Ves. 222: *Dormer* v. *Fortescue*, 3 Atk. 130.]

(*o*) [This clause does not apply to suits commenced before the passing of the act. *Paddon* v. *Bartlett*, 5 Nev. & Man. 383; 3 Adol. & El. 884.]

(*p*) [This clause contains no saving of the rights of persons under disabilities.]

(*q*) [The statute 3 & 4 Will. 4, c. 42, s. 3, has established *twenty* years as the period of limitation for the recovery of rent in an action of debt upon an indenture of demise; and generally for recovering in all actions of covenant or debt upon any bond or other specialty; and it has been held that cases within that act, i. e. cases of rent reserved or granted by specialty, are not governed by the clause in the text, except as to the remedy for such rents by *distress*; (*vide infra*, Vol. 5, p. 233); thus, an action of debt on covenant to recover arrears of *a rent-charge* or annuity may be brought within twenty years; *Stra-*

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bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but

han v. *Thomas*, 4 Per. & D. 229; so, if an action of covenant on an indenture of demise. (*Paget* v. *Foley*, 3 Scott, 120; 2 Bingh. N. C. 679). Where there is no covenant, arrears of interest on a mortgage can only be recovered within six years. *Hodges* v. *Croydon Canal Company*, 3 Beav. 86.

[Tolls payable in respect of a turnpike road are not within the act; (*Mellish* v. *Brooks*, 4 Jurist, 739); nor is interest upon a judgment within the above section. (*Kealy* v. *Bodkin*, 1 Sausse & Sc. 211. See *Hyde* v. *Price*, 1 C. P. Coop. 193).]

[Some of the enactments contained in the statute referred to in this note, (the Law Amendment Act), may usefully be stated in this place, in connexion with the subject of limitations:—

Sect. 3. *Actions of Debt on Specialties, &c.*]—"That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognisance, and also all actions of debt upon any award, where the submission is not by specialty, or for any fine due in respect of any copyhold estate, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognisance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action *given by* any statute where the time for bringing such action is or shall be by any statute specially limited."

Sect. 4. *Disabilities.*]—"That if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is, or are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, *discovert*, of sound memory, or returned beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that, if any person or persons against whom there shall be any such cause of action, is, or are, or shall, at the time such cause of action accrued, be beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond seas."

Sect. 5. *Written Acknowledgment or Part Payment.*]—Provides, "That, if any acknowledgment shall have been made, either in writing, signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such action to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or in

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within the period during which he might bring such action or suit at law or in equity."

Act not to extend to Scotland, nor to advowsons in Ireland.

Sect. 44, provides, "That this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit * to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland."

* *Sic.*

7 Will. 4 & 1 Vict. c. 28. Royal assent, 3rd July, 1837.

[Doubts having been entertained, whether, under the above act, a mortgagee was not barred of his right in every case, after the lapse of twenty years from the date of the deed, (see *Doe* d. *Jones* v. *Williams*, 6 Nev. & Man. 816; 5 Adol. & El. 291), the statute 7 Will. 4 & 1 Vict. c. 28, was passed, which, after reciting that such doubts existed, enacted, "That it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment (*r*) of any part of the principal money or interest se-

Mortgagees within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years after last pay-

case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action or* any indenture, specialty, or recognisance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute."

Sect. 6. *Limitation after Judgment or Outlawry reversed.*]—"If, in any of the said actions, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff or outlawry reversed, and not after."

Sect. 7. "*Absence beyond Seas*"—*what.*]—"That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas, within the meaning of this act, or of the act passed in the twenty-first year of the reign of King James the First, intituled '*An Act of Limitation of Actions, and for avoiding of Suits in Law.*'" *Vide ante*, p. 11, n.

(*r*) [Receipt of the rents and profits of the mortgaged estate, by an equitable mortgagee, was held to be *primâ facie* a *payment* within the meaning of the proviso in the Statute of Limitations, 9 Geo. 4, c. 14. *Brocklehurst* v. *Jessop*, 7 Sim. 438. But it seems that such receipt would not keep alive in equity any collateral security, such as a bond. *White* v. *Hillacre*, 3 You. & C. 607.]

* *Sic.*

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ment of principal or interest.

cured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding." (*s*)]

STATUTE OF LIMITATIONS, 3 & 4 Will. 4, c. 27.

Legacies within the act.

[The general scope of the statute seems to be confined to real estate, and whether the 40th section applies at all to the recovery of legacies not charged upon land has been doubted; (2 Sugd. Vend. 363, 10th ed.; *Campbell* v. *Sandford*, 8 Bligh, 622); but it has been decided, that a suit to recover money from an executor to whom it had been bequeathed upon certain trusts, and who had severed it from the testator's general estate, and applied the interest for some time upon the trusts of the will, was not a suit "to recover" a legacy within that clause, but a suit to compel a party to account for a breach of trust. So long as the executor leaves a particular legacy confounded with the general estate, so long he is answerable for that legacy in his character of executor. As soon as he has separated and appropriated it to its particular object, he becomes a trustee in respect of it; and the clause solely applies, if at all, to a suit against the executor *quâ* executor. *Phillipo* v. *Munnings*, 2 Myl. & Cr. 309.]

What suits against executors not within the act.

Limitation where there is a previous life interest in the legacy.

[In the case of *Prior* v. *Hornblow*, 2 You. & Coll. 200, Alderson, B., decided, that a bequest of residuary personalty was within the act, but that time did not begin to run against a legatee of a capital sum during the continuance of a life interest in that sum given to a third person. In a more recent case, the Vice-Chancellor held, that a claim to a legacy was within the 40th section. His Honour said it was observable, that a subsequent section, the 43rd, enacted, "That no person claiming a legacy for which he might bring an action or suit at law or in equity shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity." It was impossible, therefore, to restrict the meaning of the word "legacy," in the manner contended for, since a prohibition might issue, if the Ecclesiastical Court should entertain a jurisdiction on the same subject. *Sheppard* v. *Duke*, 9 Sim. 567.]

Sir Edward Sugden's strictures on the provisions as to legacies, &c.

[Upon this part of the act, Sir Edward Sugden remarks, that, "The provisions as to legacies should be amended. A general provision will hardly be applicable to all legacies. Is the executor to

(*s*) [See *Doe* d. *Higginbotham* v. *Barton*, Q. B., H. T. 1840; 4 Jurist, 432.] The twenty years are counted from the date of the deed, if no payment of interest has been made, not from the day of default. *Doe* d. *Roylance* v. *Lightfoot*, 8 Mee. & W. 553.

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retain those unclaimed for his own benefit, or will they fall into the residue? Will not the time run against such a claim by the residuary legatee, as well as against the claim of the particular legatee? Even as to legacies charged upon real estates, there is no saving as to *arrears* of interest for infancy or the like. In the case of younger children's portions, although by way of legacy, the interest is often allowed to remain in arrear for several years for the accommodation of the head of the family; and the statute will, unless it be modified, often bar a just claim unnecessarily, and ultimately injure the person whom it was intended to benefit; and whether a legacy be payable out of real or personal estate, of course interest upon it, where it carries interest, ought not to be barred during the infancy of the legatee."]

Limitation with reference to foreign law.

[It may be here observed, (with reference to legacies given by a foreign will, &c.), that the law of limitation relates "*ad ordinationem litis;*" it, therefore, is governed by the law of the country in which the suit is brought, although the decision as to the subject-matter may be regulated by a foreign law. *Huber* v. *Skinner*, 2 Scott, 304: *Don* v. *Lippmann*, 5 Cl. & Fin. 1.]

When possession commences to be adverse.

[To the application of the 2nd section, which fixes generally the period of twenty years from the time when the right shall have first accrued to the person claiming to exercise it, or to some person through whom he claims, the subsequent sections have annexed several qualifications and exceptions. The right to enter in respect of an estate in remainder or reversion first accrues at the moment of the determination of the next preceding estate, and the remainderman or reversioner has twenty years from that time, except in the cases where his right is expectant upon the determination of a tenancy at will, from year to year, for years in certain cases, or in tail.]

Tenancy at will.

[1. Where a tenant at will is in possession, the right of the landlord first accrues either at the determination of such tenancy, *or* at the expiration of one year next after its commencement, *at which time such tenancy is deemed to have determined*—(Sect. 7). A tenancy at will is determined at common law by the death either of the lessor or of the lessee; but if such death happen after the expiration of one year from the commencement of the tenancy, it is not to be treated as a determination of the tenancy for the purposes of the act; for, by the effect of the words in italics, the tenancy will have been previously at an end. There seems, therefore, to be no foundation for the question suggested by a learned writer, "whether, if a tenancy from year to year actually determines by the death of the tenant, for example, within the twenty years, the time is to run

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from that determination, although, if it do not determine otherwise, the time is to be computed from the end of one year from the commencement of the tenancy; for, when a tenancy at will determines, there is nothing in law to connect it with a new tenancy at will or at sufferance, or whatever it may be, created by the entry of another person, and therefore the act may, in the clause referred to, be considered to contemplate cases where the possession has continued in the same person." (2 Sugd. Vend. 352, 10th ed.)]

Doe d. *Bennett* v. *Turner*, 7 M. & W. 226.

Effect of change of occupation after adverse possession has commenced.

[At the moment of the determination of the tenancy, by whatever means, the possession begins to be adverse, and continues to be adverse until the true owner recovers actual possession, or obtains a sufficient acknowledgment of title under the 14th section; from that moment, the character of the possession, or whether it remains in the same person, is immaterial—it is equally adverse to the true owner. "We are all clearly of opinion, that the second and third sections have done away with the doctrine of non-adverse possession, and, except in cases falling within the 15th section of the act, the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession."—*Per* Lord Denman, C. J., *Nepean* v. *Doe* d. *Knight*, 2 Mee & W. 911. No conveyance or devise, or other attempt by the true owner to deal with the property, will avail, unless he obtains either an actual or a virtual possession in the manner pointed out by the act.]

Adverse possession by *cestui que trust* against trustee.

[Mortgagors and *cestuis que trust* are expressly excluded from the operation of this section; but no special provision affecting them occurs in any other part of the act. The case of a mortgagor in possession is perhaps superfluously regulated by the stat. 7 Will. 4 & 1 Vict. c. 28, stat. *ante*, p. 25.]

[On the creation of an express trust, the *cestui que trust*, if his possession or receipt of the profits is consistent with the trust, becomes tenant at will to his trustee; 4 Bac. Ab. 198; Hard. 400; 1 Lev. 270; and, as such, cannot be turned out of possession without a previous demand of possession. Co. Litt. 54. b.; 3 Hale, MS.: *Right* v. *Beard*, 13 East, 210: *Doe* d. *Newby* v. *Jackson*, 1 B. & Cr. 448: *Doe* d. *Jones* v. *Jones*, 10 B. & Cr. 718: *Roe* d. *Blair* v. *Street*, 4 Nev. & M. 42. The descent of the trust estate would not, it is conceived, determine the will; but the assent of the heir to the contract of his ancestor would, in the absence of any evidence of dissent, be implied; neither would the devolution of the possession under the equity, being consistent with the substance of the contract from which at first the tenancy at will was presumed, have that effect. Again, if the trustee were to convey the trust estate away, subject to the trust, his grantee's assent to the tenancy of the *cestui que*

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trust would be implied, as well as the assent of the *cestui que trust* to the new seignory. In all of these cases, therefore, until some act is done to determine the tenancy, it is submitted, that the trustee would not have a right to enter or bring an action, within the meaning of the 2nd section; and, therefore, that the possession of the *cestui que trust* would not be adverse to him. "There is no doubt," said *Bayley*, J., in *Doe* d. *Newby* v. *Jackson*, 1 B. & Cr. 454, "that an ejectment treats the tenant in possession as a wrong-doer at the time when the action is brought."]

[But the possession of the *cestui que trust* would commence to be adverse from the moment of the will being determined on either side, as, upon notice to quit being given by the trustee, or the legal estate being conveyed without any recognition of the trust, or if the *cestui que trust* were to act or claim in a manner inconsistent with the trust. The question, in every case, (often, no doubt, of difficult determination), would be, whether there was a tenancy at will subsisting or not. See *Keene* v. *Deardon*, 8 East, 257: *Earl of Portsmouth* v. *Lord Effingham*, 1 Ves. sen. 435: *Harmwood* v. *Oglander*, 8 Ves. 131: *Cholmondeley* v. *Clinton*, 2 Mer. 260.]

Implied trusts.

[Where no trust has been created by express words, but is implied from circumstances, the possession of the person in whose favour it is implied would be considered, in a court of law, to have been had with the assent of the trustee, as much as if the trust had been created in so many words, unless the conduct of the trustee was obviously hostile to the right of the *cestui que trust*. Thus, it was held, in the case of *Right* d. *Lewis* v. *Beard*, 13 East, 210, that the vendor of an estate having formally put his vendee into possession before conveyance, could not, without a demand of the possession again and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the purchaser as a wrong-doer and trespasser, as he assumed to do by his declaration in ejectment. So in the subsequent case of *Doe* d. *Newby* v. *Jackson*, 1 Barn. & Cr. 448. See Litt. ss. 70, 462, 463, 464. In *Doe* d. *Milburn* v. *Edgar*, 2 Scott, 732, where a purchaser was let into possession in 1814 upon a contract, under which half of the purchase-money was paid down, and interest upon the remainder was regularly paid until 1828, when the purchaser became bankrupt, it was held, that the purchaser had not been adversely in possession for twenty years, but that he was tenant at will to the vendor. The ejectment was brought upon a demise laid in the year 1834, against a purchaser who had been for several years in possession, under a conveyance from the assignees in bankruptcy of the original purchase; and as the possession of such purchaser was clearly adverse

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according to the old law, the circumstances could not come within the saving of the 17th section of the recent act; and, therefore, the case must be considered to have been decided under that act, to which, however, it does not appear from the report, that any reference was made. The case of a mortgagor in possession is a case of implied trust; and the Court, in *Doe* d. *Jones* v. *Williams*, 6 Nev. & M. 816, seemed to incline to the opinion, that it was not within the act; but the saving in the 15th section rendered a determination of the point unnecessary; and the case has since been provided for by express enactment.]

[As to presuming the surrender of trust estates, (in effect a limitation of the legal right of the trustee), *vide infra*, Vol. 6, p. 444.]

Tenant from year to year, &c.

[2. In the case of a possession as tenant "from year to year or other period" *without writing*, the determination of the first of such years or other periods, or the last time when any rent payable in respect of such tenancy shall have been received, is the commencement of adverse possession. Sect. 8. Therefore, if rent due in respect of any year's occupation is paid six years after it became due, the period is computed from the time of such payment, although no rent is paid in respect of any of the intermediate years.]

Lease in writing.

[3. When the possession is under a lease *in writing*, reserving a yearly rent of twenty shillings or upwards, the period may commence before the determination of the term, viz. at the time when rent shall have been first received by some person wrongfully claiming it as the immediate reversioner, provided no subsequent payment has been made to the true owner. Sect. 9. And the landlord is barred, for the benefit, not of the tenant, but of the person so wrongfully receiving the rent. Sect 35.]

[Where the possession is under a lease in writing, by which no pecuniary rent to the amount of twenty shillings a-year is reserved, neither the 8th nor the 9th section applies, and the possession does not commence to be adverse until the regular determination of the tenancy. Possession under a valid *parol* lease, (which cannot be for a longer period than three years), is governed by the 8th section. If the parol lease is invalid, a tenancy at will arises in the first instance, which is enlarged into a yearly tenancy on payment of rent, (*infra*, Vol. 4, p. 457). And mere discontinuance of the receipt of rent, under a lease within the 9th section, does not operate as a bar; there must be a wrongful receipt by another person. *Doe* d. *Davey* v. *Oxenham*, 7 Mee. & W. 131; *Chadwick* v. *Broadwood*, 3 Beav. 308. Overruling a dictum of Abinger, C.B., Ex parte Jones, 4 Y. & C. 467.]

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Estates tail.

[4. Previously to the statute, possession adverse to the issue in tail did not commence to be adverse to a remainderman or reversioner expectant on the estate tail, until, by failure of issue in tail, the estate of such remainderman or reversioner fell into possession. But now, by sections 21 and 22, as soon as time commences to run against a tenant in tail, it commences to run also against all those whom such tenant in tail might have barred, whether the tenant in tail lives during the whole period of limitation or not.]

Defective assurance by tenant in tail.

[If the possession has been obtained under an assurance by the tenant in tail, which is not sufficient to bar the issue, though purporting to pass the fee, it does not commence to be adverse under the last-mentioned clauses, until the death of the grantor, from which time the period of limitation begins to run. And if the possession has been obtained under an assurance that has only passed a base fee, the possession would not, under the clauses, be adverse, so long as there was in existence issue inheritable under the entail. It was proposed by Mr. Tyrrell, that twenty years' possession under a base fee, should in all cases operate as a bar of estates in remainder or reversion expectant upon such fee; but this suggestion has not been fully carried out.]

[The 23rd section in effect enacts, that possession under any assurance by tenant in tail, inoperative against those in remainder or reversion, (or, after such possession has once been had, possession by any person not entitled in respect of any interest expectant on the estate tail), shall commence to be adverse to those in remainder or reversion, as soon as (but for such assurance) *a like assurance*, executed by the tenant in tail for the time being, would, without the consent of any other person, have barred them.]

[The assurance contemplated by this clause is such an assurance as would, if made by a tenant in tail in possession, operate to bar the issue and remaindermen; so that possession under a lease and release not enrolled would not be aided by this section. Nor (assuming that the clause is retrospective) would possession under a fine, levied when fines were in use, and operating to bar the issue, have any operation under this section upon remaindermen during the continuance of the base fee; for a fine, if it could be levied, would have no effect beyond the estate tail. But as, wherever there is a discontinuance, the remainderman is put to his real action, the effect of the abolition of real actions will be, that if a base fee has been created by an assurance which has had the effect of discontinuing the issue and remainderman, and the base fee was in existence on the 1st of June, 1835, the remainderman will have lost

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his remedy ; because, on that day he could not have maintained any real action, and therefore, his right is not within the saving contained in the 38th section.]

Assurances by tenant in tail. Whether the 23rd section is retrospective.

[There is nothing in the nature of the enactment contained in this clause which affords any reason for excluding assurances previously made from its operation ; nor do the somewhat loose terms in which it is expressed, seem necessarily to require such exclusion. The words "*shall have* made an assurance," would apply perfectly well to assurances made before the act ; and the words immediately following, "which shall not operate," &c., are very slight to exclude such a construction. Words, indeed, expressly referring to past transactions could scarcely have been adopted without excluding (in terms) those to come. The clause, it is true, evidently refers throughout to the abolition of recoveries, which was effected a little later in the session ; and, in order to shew that recoveries could not have been contemplated, the terms of the section are insisted on, which require that *such assurance, if then* executed, would have operated to bar such estates ; and a recovery, it is said, could not be made at all. It might be a sufficient reply to this objection, that the clause merely puts the execution of the assurance hypothetically ; but the conclusive answer is, that when the act passed, (July 24, 1833), recoveries had not been abolished, and that recoveries suffered between the 24th of July, 1833, and the 1st of Jan. 1834, are unquestionably within the clause. Sir Edward Sugden has expressed a decided opinion against the retrospective operation of this clause. (2 Vend. & Purch. 337, 10th ed.). Mr. Hayes's leaning seems to be the other way. See 1 Introd. to Conv. 265, 5th ed.]

[To illustrate the effect of this enactment, assuming that it operates retrospectively, let it be supposed that A., tenant in tail, having made a feoffment to B., in fee, suffered a recovery to the use of B. in fee, without B.'s concurrence in making a tenant to the præcipe. Here the tortious conveyance operated not only to take out all the seisin of A., but also to discontinue his issue ; and, therefore, even after A.'s death, the issue would not be in a condition to make a tenant to the præcipe, without B.'s concurrence; so that the provision would not apply. The possession of B., however, would commence to be adverse to the issue in tail on the death of A.; and, therefore, the issue would be barred *under the statute*, at the expiration of twenty years (or a longer period in case of disabilities) from that time; and the issue being barred, the remaindermen would also be barred by virtue of the 21st section, without the aid of the 23rd.]

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[If the assurance to B. in the first instance had been made by fine, the issue could never be barred by virtue of the act, being already excluded by the assurance; and time would not commence to run until failure of such issue. In such case the remainderman could be barred only in consequence of having been discontinued and put to his real action, as already suggested.]

[If the assurance to B. had been by an innocent conveyance, his possession, after the death of the grantor, would be wrongful against the issue, and thus the 21st section would apply; and if such conveyance had been enrolled, the issue would then also be in a condition, by a similar conveyance, to bar the remainders, so that the 23rd section might also be resorted to.]

Defective assurances made by tenant in tail after the abolition of fines and recoveries.

[In cases of defective assurances made subsequently to the act abolishing fines and recoveries, there can be no difficulty: if the assurance fails as a bar for want of enrolment, or other inherent defect, the 23rd section does not apply, and the time does not run until the grantor's death, (unless the assurance failed even of passing the freehold, when the possession, being in right of a mere tenancy at will, would commence to be adverse at the time indicated by the 7th section. If the assurance fails for want of the consent of the protector, the time commences at the moment when the office of protector has ceased, provided, of course, the tenant in tail for the time being is not then under disability; for the 23rd clause contains, not in express words, but by necessary consequence, a saving of disabilities, independently of the other clauses specially enacted for that purpose.]

Effect of a forfeiture or condition broken.

[There are three other enactments respecting remainders and reversions, which may be noticed here. By the 4th section, the right of a remainderman or reversioner is not to be prejudiced by his neglect to take advantage of a forfeiture or condition broken; but though, in respect of his title to enter for the forfeiture, the possession is adverse from the time of the forfeiture incurred, it is not adverse against his title in respect of his estate until the regular determination of the particular estate.]

Case of reversioner who has been in possession before the derivative estate was created.

[By the 5th section, the right of a *reversioner* to enter, &c., on the determination of the derivative estate, is not to be prejudiced by the circumstance that he or the person through whom he claims shall have been in possession previously to the creation of such derivative estate. The object of this enactment is evident. It is, perhaps, superfluous, and seems to have been dictated by overabundant caution, with the intent of excluding what might otherwise have been contended to have been the literal effect of the 2nd and 3rd sections.]

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Situation of reversioner where the tenant of the derivative estate is barred.

[The reversioner is considered to have intrusted the guardianship of the rightful possession to the tenant of the derivative estate, and, therefore, is not to be prejudiced by the laches of such tenant, so long as the derivative estate subsists. Consequently, the right of the particular tenant may be barred by the statute, before the possession commences to be adverse to the remainderman or reversioner; for the true construction of the last part of the 3rd section, no doubt, is, that the right of a remainderman or reversioner to enter is to be considered to have first accrued at the time when it was, in its creation, limited to commence. It is to be observed, however, that as soon as the particular tenant is barred of his remedy, his "right and title" to the land, &c., in other words, his *estate*, is at an end; and the conclusion seems necessarily to follow, that (unless the disseisor can stand in the place of the particular tenant) the right of the remainderman or reversioner must commence at the same moment, so as to entitle him to the immediate possession; although, if the 3rd section requires the construction that is given above, time will not then commence to run against him.]

To what future estates the bar extends.

[By the 20th section, when the right in respect of an estate in possession has been barred, any other estate, interest, right, or possibility in respect of the same property, in reversion, remainder, or otherwise, to which the same person shall have been entitled at any time during the period of limitation, shall be barred also; unless in the meantime, some one has been in possession in right of some intermediate estate or interest. In the construction of this act generally, and the observation applies to the section under consideration, it is presumed that a rent-charge would not be considered as "an estate, interest, right, or possibility" in or to the land, (*vide infra*, p. 43); and, therefore, that the bar effected by this section would not extend to a rent-charge, acquired by any means, (suppose by grant of the wrong-doer himself), during the period of limitation.]

As to presuming the death of tenant for life.

[A difficulty is thrown upon the remainderman or reversioner where the tenant for life has died, or is presumed to have died, abroad, no tidings having been heard of him. At common law, a person who had not been heard of for seven years was presumed to have died; *Thorne* v. *Rolff*, Dy. 185; and the statute 19 Car. 2, c. 6, (stated *infra*, Vol. 4, p. 228, n.), enacted, that in any action by a reversioner, in the several cases therein mentioned, the death of the tenant for life, or *cestui que vie*, should be presumed after absence for seven years, unless the contrary were proved. The same period was adopted in the statute *De Bigamis*, 1 Jac. 1, c. 11; and in analogy to this statute, the rule has been adopted in the Courts,

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of presuming all persons to be dead who have not been heard of during seven years. *Doe* d. *George* v. *Jesson*, 6 East, 81 : *Hopewell* v. *De Pinna*, 2 Camp. 113; *Doe* d. *Lloyd* v. *Deakin*, 4 B. & Al. 433; but see *Rex* v *Harborne*, 4 Nev. & Man. 341 (*u*). Until the end of seven years, therefore, the reversioner or remainderman, unless he can *prove* the death of the particular tenant, is not in a condition to sue. The lessor of the plaintiff in ejectment must also prove that he sues in time; that is, he must prove that the tenant for life was in existence within twenty years preceding the action. If he relies upon the presumption above mentioned, to prove that the *cestui que vie* died during some part of the seven years, he is not entitled to have it presumed that he was alive at any time during the seven years, least of all, that he survived to the end of that period; in other words, there is no presumption that a party was alive at any time. "When nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died: of all the points of time, the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed, that his not having been heard of, has been occasioned by his death; which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the preceding extraordinary lapse of time during which he was not heard of becomes immaterial, by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion, that the death took place some considerable time *before* the expiration of the seven years. It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven years commencing on the death of A., or of a promissory note payable two months after A.'s death; and

(*u*) [Where Lord *Denman*, C. J., said, " It appears to me, that nothing could be more absurd than that there should be a presumption of life, or death without reference to the age, circumstances, situation of life, and common habits of the party. Can there be the same presumption as to a party who is 100, and to one who is 35—as to a party who was in good health, and one who was proved to have then had a disorder upon him which was likely speedily to terminate in his death? It is altogether a question of fact."]

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many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may, no doubt, arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute; nor is any one authority adduced in which any such rule has been laid down. It is not necessary to make any election between the beginning of seven years and the end of them, as the period to which the death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the *fact* of death, and that the time of death, whenever it is material, must be a subject of distinct proof." *Nepean* v. *Doe* d. *Knight*, 2 Mee. & W. 910; (see 4 Nev. & Man. 345). As to presuming, from special circumstances, that death took place at a particular time, see *Watson* v. *Knight*, 1 Stark. 121: *Dixon* v. *Dixon*, 3 B. C. C. 510: *Mason* v. *Mason*, 1 Mer. 308 : *Patterson* v. *Black*, Park, Ins. 644.]

[Where the title to a personal fund is in question, which may be irrecoverably dissipated and lost to the true owner, although he should appear, a longer period is requisite to raise the presumption of death. A legatee has been presumed in equity to have died after absence without being heard of for upwards of twenty years. *Dixon* v. *Dixon*, 3 Br. C. C. 510: *Lee* v. *Willcock*, 6 Ves. 606. Where a husband and his wife were drowned by the same accident, there was no presumption that the husband survived so as to entitle his next of kin to the wife's property. *Satterthwaite* v. *Powell*, 1 Curt. 705.]

Sect. 3. Right of entry, when deemed to have first accrued.

[The 3rd section is devoted to the purpose of explaining at what time, under various circumstances, the right to enter, distrain, or sue, is to be deemed to have first accrued. The cases included within this section are divided into five classes:—

1. Where possession has been discontinued.

[1st. When the person claiming, or some one through whom he claims, having been in possession or receipt of the profits, shall have been *dispossessed*, or have discontinued such possession or receipt; in which case the right is to be deemed to have first accrued at the time of such dispossession or discontinuance.]

[The effect which actual ouster formerly produced is now, therefore, attributed to a mere discontinuance of possession, and if the party in possession at any time can shew that, throughout the period

required by the statute, the possession has been either vacant, or not rightfully enjoyed, he has a complete answer to the claim of the original owner.]

Adverse possession against married women.

[The application of this clause to the circumstances attending the title of a married woman to the inheritance, seems to involve some difficulty. In a case which came before the Court of Queen's Bench, the facts were these:—A feme sole in possession of an estate in fee simple married John Corby, in the year 1772, by whom she had a son. After occupying the premises for a few years, they removed to another part of the country. In 1828, Mrs. Corby died, and her husband died in 1832. The action was brought by the son more than forty years after the abandonment of possession, (the circumstances attending which did not appear). It was contended, that the husband being entitled by the curtesy, up to the time of his death, in 1832, the son's right did not accrue until that period, the case falling within the 5th section; but the action was held to have been barred by the 17th section; *Doe* d. *Corby* v. *Branson*, 4 Nev. & Man. 664: *S. C.* nom. *Doe* d. *Corbyn* v. *Bramston*, 3 Adol. & El. 63. Lord *Denman*, C. J., gave the following reasons for the decision:—

["The fact being clear, that, within the terms of the 3 & 4 Will. 4, c. 27, s. 3, the plaintiff's mother was dispossessed or discontinued the possession or receipt of the rents above forty years before the action brought, the action is barred by section 17. Some argument was raised on the question, whether the possession was *adverse* or not, but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date.

["If the person actually in possession could be shewn to have held *under* the party through whom the plaintiff claims, the possession of the former might be regarded as the possession of the latter; but in this case there was not a single fact from which such an inference could be drawn. On the contrary, the departure of the former possessors to a distance, without appearing to have received any rent or made any demand, is the strongest evidence of their intending to abandon at once all occupation and all claim of ownership; and as the title of the plaintiff's ancestor rested on no documents except the will of the former husband, but was merely evidenced by possession at an early period, that ancestor's entire desertion of the premises for so long a time goes far to shew a consciousness that the anterior occupation was without title."]

Limitation against married women.

["It is true, that, if Mrs. Corby was the owner, her husband was tenant by the curtesy, and their son's right of possession did not

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accrue till after his father's death; but this furnishes no answer to the positive enactment of limitation in the 17th clause."]

Remarks on *Doe* d. *Corbyn* v. *Bramston*.

[The above decision appears to be open to much observation. To pass over the preliminary objection, that no inquiry seems to have been made whether the possession was adverse at the time of the passing of the act, and therefore whether the 15th section did not apply, (the action was commenced in 1835), it is to be observed, that the judgment of the court was founded on the 17th section which has for its object merely to prevent the period of limitation from being extended *by disabilities* beyond the period of forty years. In the case before the court there was no disability in question. On the birth of the son the husband had become tenant by the curtesy for his own life and *in his own right* (*x*), during which time neither the wife nor her heir could be entitled to enter, and this occurred before the commencement of the adverse tenancy. After the birth of issue and during her husband's life, therefore, the wife was not under disability within the 16th and 17th sections, because she had no right to make an entry &c. (See Bac. Ab. *Curtesy* (E); 2nd Inst. 301, 309). The wife's title having first accrued to her son in possession on the death of the husband, the case comes within the protection of the 5th section, which gives the reversioner a new right on the determination of the particular estate, although he, or one through whom he claims, was formerly in possession.]

[Sir *Edward Sugden*, without impugning the authority of the decision in *Doe* v. *Bramston*, inquires whether its principle would apply where the possession has been gained under an assurance by the husband alone, or an assurance inoperative to bind the wife, and comes to the conclusion that the cases are distinguishable. Of course, where the husband has conveyed his estate by the curtesy or his interest during the joint lives of himself and his wife, there can be no pretence for saying that, during the subsistence of the marital contract, the wife is prevented from making a claim by *disability*.]

Estate by the curtesy.

(*x*) ["After issue had he shall do homage alone, and is become tenant to the lord; and the avowry shall be made only upon the husband in the life of the wife. * * * * And it is adjudged in 29 Ed. 3, that the tenant by the curtesie cannot claim by a devise, and waive the state of his tenancy by the curtesie, because, saith the book, the freehold commenced in him before the devise for term of his life." — 1st Inst. 30 a. And this account of the estate by the curtesy is confirmed by the rule as to estates tail before the Statute de Donis. Such estates could not be aliened until the birth of issue in tail; and if the donee neglected to exercise his power during the life of the issue, and the issue died, he could no longer aliene. But if a feme tenant in tail special, and had issue in tail, though she survived her husband, the estate was absolutely free from the condition, the husband's estate by the curtesy initiate being regarded as alienation for his life. *Nevil's case*, 7 Rep. 62: *Payne's case*, 8 Rep. 35.]

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[The case of *Ravald* v. *Russell*, 1 Younge, 9, which occurred before the act, and in respect of an equitable ownership, was as follows:—In 1757, A. and B., husband and wife, being seised in fee in her right, by lease and release conveyed the lands by way of mortgage to C. for £600, reserving the right of redemption on payment of the principal and interest to the husband. The husband and wife levied a fine to the use of the mortgagee in fee. In 1765, by indenture of lease and release, reciting that C., the mortgagee, had contracted for the absolute purchase, A. and B. conveyed the lands to C., discharged from all equity of redemption; but on this occasion no fine was levied, though a covenant to levy one was inserted in the deed. The husband, who survived the wife, and by whom she had had issue, died in December, 1809. On the death of the wife, the fee, subject to the husband's life interest by the curtesy, descended to their eldest son, whose assignees in bankruptcy, in November, 1829, filed a redemption bill against C., the mortgagee and purchaser, who pleaded the Statute of Limitations, or rather, the rule of equity, founded on analogy to that statute; but the plea was overruled, on the ground that the statute did not begin to run against the heir of the wife until the death of the husband, whose conveyance operated to pass his life estate in the equity of redemption, and therefore until his decease there was no adverse possession.]

[This was an extreme case. The husband lived forty-four years after his conveyance of the equity of redemption, and the bill was filed nineteen years and eleven months after his death, making together a period of nearly sixty-five years, during which the purchaser had been in possession, conceiving himself to be absolute owner. See, also, *Doe* d. *Wilkins* v. *Wilkins*, 5 Nev. & Man. 434, as to adverse possession of the wife's chattels real.]

2. Abatement.

Devisee.

[2nd. When the claim is made to the estate or interest of some person who died in possession or receipt of the profits, or of the rent, and was the last person entitled who had such possession or receipt, the right is deemed to have first accrued on the death of such person. This clause would apply to the case of an heir excluded from his inheritance by abatement, and, it should seem, to a devisee of the fee, (who is *hæres factus*, and claims the estate of the testator). But a devisee of a particular estate or of a rent charge cannot properly be said to claim "the estate or interest" of the testator; and, as we shall see presently, his case does not come within the section under consideration.]

3. Title by

[3rd. When the title is derived from an instrument, (*not being a*

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alienation inter vivos.

will), made by a person in possession, &c., *in respect of the same estate or interest*, and no possession has ever been had under the instrument, the right accrues at the time indicated by the instrument. The case of a mortgagee who has allowed the mortgagor to retain possession, which comes within the letter of this clause, has been excepted by a recent statute, stated *ante*, p. 25.]

What cases are not within the 3rd section.

[The effect of the words, "in respect of the *same* estate or interest" is not very clear; they would seem to confine this part of the 3rd section to cases of absolute alienation of the entire interest of the grantor, and to exclude grants of particular estates or rents *de novo;* and this is the construction which was suggested by Lord C. J. *Tindal*, in delivering the judgment of the court in the case of *James* v. *Salter*, (4 Scott, 180, *infra*, p. 42). Such a construction would throw a very large class of cases back upon the general provision of the 23rd section, and would afford additional ground for considering the 3rd section as an explanatory clause merely, intended to illustrate the application of the 2nd (*y*). For when a person claims in respect of an estate not newly created in him, but transferred merely to him by another, it might be said, but for the 3rd section, that the right to enter, &c., in respect of such estate, first accrued to his grantor, being a person "through whom he claims." Such a construction would, no doubt, be a great strain upon the spirit of the 2nd section; but the possibility of its being insisted on furnished a sufficient reason for the explanation contained in the 3rd section. Against this confined interpretation of this part of the 3rd section, there is the word "appointed," which, as an appointment always operates to displace the subsisting estate, can never be a means of transferring the appointor's estate. The case of an appointment properly belongs to the next division of this section, touching "future estates and interests." Since it has been decided that all cases not falling within the 3rd section are governed by the 2nd, the point is only interesting for the purpose of accounting for the incompleteness of the enumeration contained in the 3rd section.]

Whether there can now be non-adverse possession.

[The language of the 2nd section of the recent statute is, in substance, the same with that of the stat. 21 Jac. 1, c. 16, s. 2, and this has given rise to an apprehension that, (contrary to the opinion of the court in *Nepean* v. *Doe*, *ante*, p. 28), the old doctrine of non-adverse possession is not entirely at an end, but will still be appli-

(*y*) [This construction would then account for the exclusion of a gift by will,—a gift by a testator of his whole estate and interest having been already included in the second division of the 3rd section.]

Non-adverse possession.

cable to cases which, not being within the 3rd section, fall back upon, and are exclusively governed by, the general forms of the 2nd. The learned author of the treatise on "Vendors and Purchasers," observes that, "The *decision* in *James* v. *Salter* withdraws from the operation of the 3rd section, cases of the creation of rents, for example, by will; and the principle of the decision would, as we have seen, if followed up, exclude from the operation of that section all particular estates not clothed with possession, whether created by deed or will. But, to whatever extent the case may be followed, the question is, how far will the doctrine of adverse possession apply. Cases will be included in the 2nd section although excluded from the 3rd; and all the general provisions in the act relating to possession by a tenant at will from year to year, by lessees for years, in writing, and the like, will equally apply to them; but it should seem, that where the new law is silent, a possession in such cases, which would not have been adverse before the act, will not now have that operation. This, of course, would be a surprise upon the framers of the act." (Vol. 2, p. 353, 10th ed.).]

[The disposition which the courts, both of law and equity, have always exhibited to preserve an analogy to the statutes of limitation, in their decisions upon cases not falling literally within those statutes, would doubtless lead them to apply the principle of adverse possession, which is involved in the 3rd section, to other cases not strictly coming within its terms. But the question does not seem to possess much practical importance, for there is probably no case of possession, adverse within the spirit of the 3rd section, but excluded from its operation by even the strictest construction, which would not be held to be adverse under the old law, aided by the other clauses of the act relating to tenancy at will, &c. The only rights which appear to be left unprovided for by the 3rd section, are rights in respect of particular estates and rent-charges, created *de novo* by deed or will, and in respect of which no enjoyment has ever been had; and with respect to these, it is obvious, that no new rule would have been introduced had they been expressly included within the 3rd section.]

4. Future interests.

[4th. Where the claim is made in respect of an interest, which was originally an interest in remainder or reversion, or other future interest, and under which no possession has ever been had, the right is deemed to have accrued when it first fell into possession, by the natural determination of the particular estate, and not (sect. 4) by forfeiture or breach of condition. *Vide ante*, p. 34.]

5. Forfeiture

[5th. Where the claim is founded on a forfeiture or breach of con-

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and condition broken.

dition the right is deemed to have accrued on such forfeiture, or breach.]

What cases are excluded from the 3rd section.

Interests under wills.

[Interests under wills are expressly excluded from the operation of the third branch of the 3rd section; and the case of a legacy or rent, charged on land by will, not being within any other part of that clause, would be altogether unprovided for by the act, if it were held that the 3rd clause was intended to limit, as well as to explain, the generality of the 2nd clause, a construction to which the Court of Common Pleas at one time inclined; (see *James* v. *Salter*, 2 Scott, 750); but the act has since received a more liberal interpretation, and it is now settled that cases not included in the 3rd section may yet be brought within the 2nd. Thus, where a testator charged an annuity on his freehold lands, and the annuitant never received any part of the annuity during twenty years from the testator's death, he was held to have become barred by the 2nd section from afterwards distraining for any portion of it. *Tindal*, C. J., said—"It is manifest that the facts found in the special verdict will bring the case precisely within the provision of the 2nd section of the act, unless that section is to be governed and controlled, not simply explained and construed, by the 3rd; that is, unless the 3rd section does, in terms, exclude from the operation of the 2nd the claim of any person whose right to a rent is derived under a will by reason of the words 'other than by will,' which are found in the 3rd section. And when this case was originally before the Court, upon a motion for a new trial, after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the Judges then in Court, that the present case was excluded from the operation of the 2nd section, by reason of its not being comprehended within the 3rd, which 3rd section appeared to us, upon a more hasty view, to contain an enumeration of instances in which only the 2nd section could be held to be applicable. For myself, however, I am ready to admit, and I am authorised at the same time to say the same for my three brethren who were then in Court, that the further argument which we have heard on this point when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed: and that we think (in which my brother Vaughan entirely concurs with us) that this case is governed by the 2nd section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity.]

James v. *Salter*.

["That the case must have been governed by the 2nd section,

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Cases not within the 3rd section.

if that section had stood alone, cannot be doubted; and, upon a more close examination of the 3rd section, the object and intent of it seems to us to be no more than this—to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included among the instances given by the third, to be governed by the operation of the second. Many reasons concur to shew that such must be the just construction of the act. In the first place, if it had been intended that the third section should limit the application of the second to those cases, and those cases only, which are enumerated in the third, it might justly have been expected that words would have been employed to express clearly and distinctly such an intention; but, in this section, there are no words that can be said directly to exclude all instances except those enumerated in the 3rd section. Again, if the words, 'granted by any instrument other than a will,' were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute; for the instance in the 3rd section, immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, 'or other future estates or interests,' is large enough to comprehend, and would comprehend, all executory devises; and, again, sect. 40 expressly provides for the case of any legacy: and, indeed, the words, 'by any instrument other than a will,' carry the matter no further than if the 3rd section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case, not being enumerated in the 3rd section, fell back upon the general provision contained in the 2nd. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, *viz.* the devise of an estate in possession in land, or of an estate in possession in a rent-charge first created by the will, would be altogether unprovided for by the statute; for the third class of instances enumerated in sect. 3, describes the grant to be 'by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent;' a decision which can neither apply to the case of a devise of a particular estate

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in land, or of a newly-created rent; for the devisor, who has by his will carved an estate in land out of the estate whereof he was seised, can never be said to have been possessed in respect of *the same estate or interest* as that claimed by the devisee(*z*); still less can the devisor who creates a new rent-charge by his will, be said to have been in the receipt of the rent. The case, therefore, under discussion not falling within the 3rd section, but falling within the clear and unambiguous words of the 2nd, we hold it to be governed thereby." *James* v. *Salter*, 4 Scott, 168.]

Receipt of rent.

[What shall be deemed adverse possession in particular cases is, for further certainty, ascertained by some additional clauses. The receipt of rent from a tenant from year to year, or other lessee, is to be deemed the receipt of the profits, (sect. 35). And the receipt of a different rent from that reserved by the lease would, of course, be sufficient under this clause, upon the presumption, that a new arrangement respecting the rent had been entered into. See observation, *ante*, p. 30.]

Entry or continual claim.

[A mere entry or continual claim is not sufficient to keep alive the right. (ss. 10, 11).]

Possession of coparcener, &c.

[The possession of a coparcener, joint-tenant, or tenant in common, for the benefit of himself or any other person than his coparcener, &c., is adverse; (sect. 12); and the possession of a younger brother, or other relation of the heir, is also adverse to the heir. (sect. 13).]

Administrators and executors.

[Possession commences to be adverse to an administrator from the time of the death of the person whose effects he claims, however distant may be the time at which the administration is granted. An administrator, of course, cannot be under disability *ab initio*, but an executor may; (stat. 38 Geo. 3, c. 87); and would be entitled, it is presumed, to the usual allowance; but if an executor died under disability and intestate, it seems that the administrator *de bonis non &c.*, could not claim the benefit of the provision for disability.]

Possession not adverse when act passed.

[Where the possession was not adverse at the time when the act passed, five years from the passing of the act are given to the rightful owner, notwithstanding the twenty years have elapsed. (sect. 15).]

(*z*) [In the construction of the stat. 32 Hen. 8, c. 34, however, it is well known that the words, "grantee of the reversion," have been held to include a grantee of a particular estate only in the reversion, and that either in the whole or in part of the land originally included in the reversioner's estate. *Attoe* v. *Hemmings*, 2 Bulst. 281: *Burton* v. *Barclay*, 5 Moo. & Pay. 785: *Twyman* v. *Pickard*, 2 B. & Al. 105. *Vide infra*, Vol. 4, p. 422.]

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Disabilities.

[A further time is allowed beyond the period of twenty years in certain cases of disabilities, (in which imprisonment, and absence in any part of the United Kingdom, or in the Islands of Man, Guernsey, Jersey, Alderney, and Sark, or any adjacent island belonging to the Crown, are not included), (sect. 19). Where the rightful owner at the time when adverse possession commences is under disability, a further period of ten years is allowed from the death of such person, or the termination of his disability, whichever first happens; but no time is allowed in respect of any new disability that may supervene, after there has once been adverse possession against the true owner, while under no disability. And no further time is given in respect of any disability of the next claimant, in case the person entitled when the adverse possession commenced died under disability, (ss. 16, 18). The rule was different under the statute of James, which allowed a succession of disabilities, (*Cotterell* v. *Dutton*, 4 Taunt. 830), though time could not be stopped after it had once commenced running. *Doe* v. *Jones*, 4 T. R. 300. And no duration of disabilities is to keep alive a right beyond the period of forty years from the time when such right first accrued. (ss. 17, 18). As to these provisions, see some remarks *ante*, pp. 25, n., 27, 38.]

Limitation of claims in equity.

[The limitation of equitable claims was not formerly regulated by any enactment, but only by a rule adopted by courts of equity, in analogy to that by which rights of entry were then bound. (4 You. & C. 53). The recent statute has now for the first time supplied a strict legislative bar to the enforcement of equitable rights, corresponding with the rule as to rights at law, (sect. 24).]

Express trusts.

[In cases of *express* trusts, the right is to be deemed to have first accrued "at and not before" the time when a conveyance shall have been made to a purchaser for value; and then only as against such purchaser, and those claiming under him (*a*). The rule in equity was formerly the same, with one exception; it having been decided that length of time would not protect a purchaser with notice of charitable trusts. *Att.-Gen.* v. *Christ's Hospital*, 3 My. & K.

Charitable trusts.

(*a*) [The clause is not very consistent in its terms: the right to bring a suit "against *the trustee*, or any person claiming through him, is to be deemed to have first accrued at the time of a conveyance to a purchaser, and then only as against *the purchaser*, and those claiming through him. It may be an important question upon this section, whether the words, "any person claiming through" the trustee, apply exclusively to those claiming the *legal* estate, or whether they would include a person wrongfully exercising a beneficial dominion over the property with the consent (whether given under mistake or otherwise) of the trustee. There seems to be good ground for contending that the former is the true meaning, and that the words do not apply to an enjoyment with the trustee's permission, under circumstances similar to those which occurred in the case of *Cholmondeley* v. *Clinton*.]

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344; see *Att.-Gen.* v. *May. of Bristol*, 2 Jac. & W. 321; *Att.-Gen.* v. *Poulden*, 8 Sim. 472; and as to eleemosynary corporations sole under the present act, see sect. 29. Thus, in deciding that purchasers with notice of a trust were protected by length of time, Lord Commissioner *Ashurst* said—"As to the trust being an exception to the Statute of Limitations, the rule holds only as between trustees and *cestui que trusts*. It is true that a trustee cannot set it up against his *cestui que trust*. But this is merely the case of a trustee by implication, and, as such, affected by an equity; but that equity must be pursued within some reasonable time. Both courts of law and equity preserve an analogy to the Statute of Limitations (*b*). The case of mortgagor and mortgagee is a stronger case than this. *Aggas* v. *Pickerell*, 3 Atk. 225." *Townshend* v. *Townshend*, 1 Cox, 28; 1 Br. C. C. 550. See as to implied trusts, *Smith* v. *Clay*, 3 B. C. C. 639, n.: *Romney* v. *Ridgard*, 1 Cox, 145: *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630. But though the remedy against the purchaser is barred, the liability of the trustee may continue subject to the discretion, expressly reserved to courts of equity (sect. 27), of refusing relief, on the ground of acquiescence or otherwise. And here it is to be remembered, that the analogy between legal and equitable estates, though strictly preserved by the statute, will not probably be regarded by courts of equity, in the exercise of their discretion, so far as estates in remainder or reversion are concerned. A remainderman may sue in equity upon a breach of trust, although his interest has not fallen into possession, or is even contingent. *Andrew* v. *Wrigley*, 4 B. C. C. 125. See *Bandon* v. *Becher*, 3 Cl. & Fin. 479.]

[In cases of fraud or mistake, the right to sue is to be deemed to have first accrued at the time when such fraud or mistake shall, or, with reasonable diligence, might (*Denys* v. *Shuckburgh*, 4 Y. & C. 53) have been first known or discovered. But this extension of the period is not to prejudice purchasers for value without notice, (sect. 26). Adverse possession which would bar a trustee, if he united the legal and beneficial possession in his own person, will not be rendered the less effectual by the circumstance that the equitable ownership subsists in a different person. [*Llewellyn* v. *Mackworth*, Barnard. 445: *Hopkins* v. *Hopkins*, 1 Atk. 581.]

[The effect of the 28th section, respecting mortgagees, is consi-

(*b*) [Thus, equity, in analogy with the rule of law, does not allow disability to arrest the time when it has once commenced running. *Franco* v. *Alvarez*, 3 Atk. 346. But where the analogous right at law would have allowed the bringing of a real action, equity did not admit the longer period of limitation, applicable to that species of right at law. 2 Jac. & W. 192.]

dered *infra* Vol. 5, p. 383 *et seq.* (In a case just reported, a *foreclosure* suit was held to be within the 40th section; because, although in form it seeks nothing more than an exclusion of an equity, it is in substance a suit for the recovery of the mortgage money. *Dearman* v. *Wyche*, 9 Sim. 570). STATUTE OF LIMITATIONS.

[The decision in *Cholmondeley* v. *Clinton*, 4 Bligh, 1, that there might be adverse enjoyment of an equity of redemption, which is a species of equitable interest arising by implication, applies equally to other cases of implied (*Collard* v. *Hare*, 2 Russ. & Myl. 675) and also to *express* trusts. This will be apparent from an examination of all that was said by Lords *Eldon* and *Redesdale* in that case, notwithstanding the seemingly contrary tendency of some observations made by Lord *Eldon*, as to the difference between the situations of a mortgagee and a trustee by express words. And it will still be necessary to resort to the doctrine of this case, wherever a third person, other than a purchaser for value, has had the beneficial enjoyment of land or rent, the legal estate in which is outstanding in a trustee, and subject to an *express* trust; inasmuch as the 25th section controls the generality of the 24th, with regard to such trusts. If, therefore, a stranger obtains the beneficial enjoyment during twenty years, of property that is subject to an express trust, so as to bar the *cestui que trust*, under the doctrine of *Cholmondeley* v. *Clinton*, (which he might do without acquiring a title by adverse possession against the trustee), it follows, that he will then be entitled to call upon the trustee for a conveyance of the legal estate. It must not be forgotten, however, that the doctrine of *Cholmondeley* v. *Clinton* has never been applied to cases of direct trust, while the wording of the 26th section seems to be directly opposed to such an application; and courts of equity may consider that they are not authorised, by the saving contained in the 27th section of their jurisdiction to refuse relief "on the ground of acquiescence or otherwise," to adopt one inflexible rule of general application; since the Legislature, had such been its intention, could have promulgated such rule; but that they must still hold themselves open, in each case, to consider what has been the conduct of the parties claiming their assistance. See *Denys* v. *Shuckburgh*, 4 Y. & Col. 53. The case of a succession of disabilities, extending beyond the period allowed by the statute, would raise the question here suggested. But see the note *ante*, p. 46.] Express trusts. Discretion left to courts of equity.

[In cases of implied trusts the 24th section operates; but where the trust is express, the statute, it has been seen, creates no inflexible bar to the remedies of the *cestui que trust* against the trustee and volunteers claiming under him; and equity which may shorten, though it may never add to the time allowed by the statute) will No statutory bar between express trustee and *cestui que trust*. Remedy for

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breach of an express trust may be lost by laches.

exercise its discretion, and determine from the particular circumstances in each case, whether or not the *cestui que trust* has been guilty of such laches as should preclude him from relief. (*Smith* v. *Clay*, 3 B. C. C. 649: *Strafford* v. *Lord Aldborough*, 1 Beat. 236: *Bond* v. *Hopkins*, 1 Sch. & Lef. 413: *Pickering* v. *Lord Stamford*, 2 Ves. J. 581). Thus, where estates had been devised in trust to pay debts, and subject thereto for the testator's infant children, and the surviving trustee retained possession of one of the estates in satisfaction of debts which he alleged himself to have paid, and a bill was filed for an account and conveyance of the estate forty-five years after the testator's death, by one of the children and the representatives of another; inquiries were directed to ascertain whether they had any notice of the circumstances, whether they had in any manner released, and whether the trustees had made advances to the amount of the value of the estate. Sir *T. Plumer*, M. R., said: "The reason that I direct these inquiries is, that though I am impressed with the impolicy of permitting stale demands to be brought forward; though I know that, on the principles stated in *Smith* v. *Clay*, (Amb. 645; 3 Br. C. C. 639, n.), a court of equity is not to be called into action by those who are not vigilant in support of their rights; and am aware of the monstrous inconveniences that would result, if at some period the door were not shut to litigation; yet I fall in entirely with the opinion expressed by Lord *Alvanley* in *Pickering* v. *Stamford*, (2 Ves. Jun. 272). There the suit was commenced after a lapse of thirty-five years, by persons who declared themselves to have been ignorant of the existence of their rights. Lord *Alvanley*, under the circumstances of that case, could not be sure that they were not ignorant; and therefore, stating strongly his opinion in favour of the general principle, that a party ought to be barred by length of time, and lamenting that he could not in that instance follow it, he directed similar inquiries, stating, at the same time, that if he were then to decide it, he should decide it against the plaintiffs, and that, by the inquiries, he did not decide one way or the other, and would afterwards consider whether there was sufficient equity in the bill. I feel too, that we are here dealing between trustee and *cestui que trust;* and the strong ground I have for my doubts is, that, till the relation is determined, the possession of the trustee is the possession of the *cestui que trust*. If the estate be given him in trust to sell, it remains in him for that purpose till something is done to put an end to the character in which he stands, and he continues liable for ever, or at least for a considerable time, the court considering the trustees bound to protect the interest of the *cestui que trust* without his interposition; and

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the length of time during which the trustee has omitted to discharge his trust is not a bar to its performance. Again, if this trustee advanced money for the payment of debts, he could not by his own act, if nothing had passed with the *cestuis que trust*, keep the estate unsold and make it his own; he would only have a right to hold it as a security. In purchases by a trustee from his *cestui que trust*, an act is done which, though open to inquiry, puts an end in form to the relation between them; if the purchase stands, he is no longer a trustee; the other party has permitted him to become the beneficial owner. He cannot, however, by any act of his own without communication with his *cestui que trust*, denude himself of the character of trustee till he has performed his trust (*c*). The mischiefs of a purchase from a *cestui que trust* by his trustee are great; but it would be monstrous if he could fix a price and buy it of himself tacitly without a word said to his *cestui que trust*, and then say that, by lapse of time, it had grown into his absolute property, though he was originally only trustee. Here is the difficulty, and therefore I direct these inquiries as the safest course." *Chalmer* v. *Bradley*, 1 Jac. & W. 51.]

[To the same effect was the language of Lord *Langdale*, M. R., in the case of *Wedderburn* v. *Wedderburn*, 2 Keen, 749: "In *Gregory* v. *Gregory*, G. Coop. 201, and *Champion* v. *Rigby*, 1 Russ. & Myl. 539, the court dismissed bills upon which, if filed early, the plaintiffs would have been entitled to relief, on account of a delay of *eighteen* years; and it was justly argued that time is no bar in cases of direct trust; it may be otherwise if there has been a direct and independent dealing between the trustees and *cestui que trust* after the relation has terminated. In this case, notwithstanding the relation of trustees and *cestui que trust*, and of guardian and ward, if I could have been satisfied, on examination of all the documents and evidence, that the children respectively, on their coming of age, had been duly informed of the real nature and effect of the transactions, or seeming transactions, which the executors and surviving partners took upon themselves to arrange between themselves and the estate of the deceased partner and testator; and if the relation between trustee and *cestui que trust* had then ceased, I should have thought time would have been a bar; I should not have thought it right to open the investigation of transactions so long treated as closed." (See S. C. on Appeal, 4 Myl. & Cr. 52).]

[Again, where a testator gave the residue of his personal estate

(*c*) *Vide infra*, Vol. 5, pp. 413, 417.

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for charity, and a school was founded accordingly, and thirty-five years after the testator's death, the representatives of the next of kin filed a bill for an account as to part of the personal estate, which was secured on mortgage and therefore inapplicable to the charity. Sir *R. P. Arden,* M. R., said: "I do not feel warranted to dismiss this bill; for I should be very happy to do it, if I was authorised by law to say this court could not entertain a bill after seventy years, every disability to sue being removed. I heartily wish it was so, and see no reason why it should not. It is a grievous thing that the defendants should be disturbed after so long a lapse. If they had got hold of the estate and levied a fine, it would have barred all the world; at the same time I know no rule that has established that mere length of time will bar. If I did, I would dismiss the bill. Therefore, that being the case, I am to say whether, under such circumstances, a bar can be presumed." (*Pickering* v. *Lord Stamford,* 2 Ves. Jun. 283). Ultimately there being found upon inquiry to be no special circumstance affording a presumption of a release, a decree was made for the next of kin. (S. C. 2 Ves. J. 581). See, also, *Beckford* v. *Wade,* 17 Ves. 97: *Todd* v. *Lee,* Id. 273: *Hovendon* v. *Lord Annesley,* 2 Sch. & Lef. 633: *Cann* v. *Cann,* 1 Vern. 480: *Gwillim* v. *Stone,* 14 Ves. 128: *Huet* v. *Fletcher,* 1 Atk. 467: *Roche* v. *O'Brien,* 1 Ball & B. 330: *Hargreave* v. *Michell,* 6 Mad. 326: *Jones* v. *Turberville,* 2 Ves. J. 11; 4 B. C. C. 115: *Bennett* v. *Colley,* 2 Myl. & K. 225: *Brooksland* v. *Smith,* 2 You. & Coll. 58: *Monck* v. *Paget,* 3 Cl. & Fin. 431.]

[Upon the whole, it appears that, excepting as to cases of mistake or ignorance, (*Berrington* v. *Evans,* 1 You. & C. 439, *Brooksbank* v. *Smith,* 2 Y. & Col. 58: *Denys* v. *Shuckburgh,* 4 Y. & C. 53), legacies, charitable trusts, charges, and mortgages, the statute has made no alteration in the rules of limitation which equity had already adopted: and has left many subjects of equitable cognisance unprovided for. As to the lapse of time and circumstances which will induce a court of equity to refuse its assistance in enforcing performance of an agreement, see *Scho'efield* v. *Whitehead,* 2 Vern. 127; *Stapleton* v. *Stapleton,* 1 Atk. 2: *Wingfield* v. *Whaley,* 1 Br. P. C. 200: *Gill* v. *Fleming,* 1 Ridg. P. C. 420: *Pincke* v. *Curtis,* 4 Br. P. C. 350: *Marquis of Hertford* v. *Boore,* 5 Ves. 719: *Alley* v. *Deschamps,* 13 Id. 225: *Hearne* v. *Tenant,* Id. 287: *Stockley* v. *Stockley,* 1 Ves. & B. 23: *Wright* v. *Howard,* 1 Sim. & Stu. 190.]

Extinction of the *right and title.*

[The effect of the 34th section, which enacts, that, at the expiration of the period of limitation, the right of the party in possession shall be extinguished, may not in all cases be of easy determination. Thus, if a tenant at will continues in possession for nine-

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teen years after the determination of his tenancy, and is then turned out of possession by a stranger, and the owner suffers another year to elapse without asserting his right, he will be deprived both of his remedy and his title. It should seem that the original wrong-doer would then be entitled to recover the land from the person who had turned him out; for the title must be in some person, and can only be, it should seem, in him whose act has deprived the true owner of it (*d*). The language of the Court of Queen's Bench in the case of *Doe* d. *Thompson* v. *Thompson* 2 Nev. & P. 656; 6 Adol. & El. 721, where the point, however, was not considered to have arisen, seems not to favour this view. There an ejectment was brought against a stranger in possession, and the lessor of the plaintiff proved that his father, (in whose right he claimed as heir), had been in possession of the land as tenant at will, without acknowledgment, for upwards of twenty years before his death in 1831, since which time his widow, the present defendant, has been in possession. The original owner died in 1833, having devised the land to trustees. No proof of title was given for the defendant. *Per Cur.* "The monstrous consequences which would follow the construction of the act attempted to be put upon it by Mr. Andrews, shews that it cannot be the correct one; for it would make out that any person who had held for twenty years, without making any acknowledgment or paying rent, might come

Case of *Doe* d. *Thompson* v. *Thompson*.

Retrospective operation of the act.

(*d*) [Of course, if the wrong-doer has been in possession for twenty years, he has a *primâ facie* title. *Stocker* v. *Berny*, 1 Ld. Raym. 741: *Doe* d. *Barswell* v. *Barnard*, Cowp. 595: *Doe* d. *Danson* v. *Parke*, 4 Adol. & Ell. 816: *Doe* d. *Payne* v. *Webber*, Id. 119; 3 Nev. & Man. 746: *Doe* d. *Draper* v. *Lawley*, 3 Nev. & M. 331. In *Doe* d. *Harding* v. *Cooke*, 5 Moo. & Pay. 181, the lessor of the plaintiff relied upon the undisturbed possession of himself and father during twenty-three years, and the defendant relied on a possession during ten years succeeding the twenty-three. The court, in deciding in favour of the plaintiff, said: "It was proved at the trial, that the elder Harding and his son held the premises for twenty-three years, and that during that period they received and increased the rent. These were unequivocal acts of ownership, from which the law presumes a seisin in fee. The father died seised, and the lessor of the plaintiff is the only son who is shewn to have survived him. Indeed, it did not appear that he ever had any other son. That would be sufficient evidence, even in a writ of right, to call upon the tenant to shew and prove his title. It is admitted, on the part of the defendant, that this proof would have been sufficient if the action had been brought within a year or two after the lessor of the plaintiff had been out of possession. But, if two years would not have preponderated against the lessor of the plaintiff, I see no reason why ten, or any period short of twenty years, should raise a counter presumption. * * * The defendant must either rely on a title in himself or on the *jus tertii*." See *Doe* d. *Wilkins* v. *Cleveland*, 4 Man. & Ry. 666: *Holmes* v. *Newlands*, 3 Per. & D. 128: 10 Ad. & El. 44.]

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Rights *conferred* by the statute.

at any time within the period limited by the act, and turn any one out he found in possession. It would have been quite different if the lessor of the plaintiff had been the tenant at will, and had remained in possession for twenty years, for then the 2nd and 7th sections would have given him a certain title, which would not have been defeated by the 15th section, if an action had been brought against him by any but the real owner (*e*). But here he must succeed on the strength of his own title. The tenancy here terminated by the death of his father in 1831, two years before the passing of the act; and yet it is contended, that, by virtue of the act, he has obtained an indefeasible estate, except against the real owner, by virtue of his father's possession for twenty years." The action was brought within five years from the passing of the act, and therefore unless the possession of the party in possession was adverse at the time of the passing of the act (*f*), which, if the view above suggested is correct, was the true question in the cause, the right of the original owner was still subsisting. But had the five years elapsed, or had the possession of the widow been adverse when the act is passed, it is submitted, that the right of the original owner was at an end, and the question above suggested had arisen.]

[If the second wrongful claimant has originally come in under the first, of course he cannot dispute his title, and therefore may be turned out at any time within twenty years. See *Doe* d. *Willis* v. *Birchmore*, 9 Adol. & El. 662.]

Other clauses in the act.

[The remaining sections of the act, which have not been noticed in this review of its more important provisions, relate to the claims of an administrator, (sect. 6); acknowledgment of title, (sect. 14); claims by spiritual and eleemosynary corporations sole, (sect. 29); advowsons, (ss. 30, 31, 32, 33, which by s. 44, do not affect benefices in Ireland); abolition of certain real and mixed actions, (ss. 36, 37, 38); descent cast, discontinuance, and warranty, (sect. 39); arrears of rent and interest, (sect. 42); and spiritual courts, (sect. 43). See the notes to the different sections of the act, *ante*.]

STATUTE OF LIMITATIONS AGAINST THE CROWN.

Stat. 21 Jac. 1, c. 2.

[*The Crown.*—The rule "*nullum tempus occurrit regi*," (Litt. sect. 178), was first materially circumscribed, and the enforcement of the rights of the Crown limited in point of time, by the stat. 21 Jac. 1, c. 2, to sixty years from the commencement of the session of Parlia-

(*e*) [This remark is not very intelligible. How could any person but the real owner recover from the person actually in possession under any circumstances?]

(*f*) [If the possession was adverse on the day the act passed, the 15th sect. is excluded, although two days before the act passed there was no adverse possession.]

STATUTE OF LIMITATIONS AGAINST THE CROWN.

ment in which the act was passed,—a limitation which gradually became less effectual, until the statute of the 9th Geo. 3, c. 16, usually called the *nullum tempus* act, was passed, which disables the Crown from suing for any manors, lands, tenements, rents, tithes, or hereditaments whatsoever, (*other than liberties* or *franchises*, or the revenues, issues, or profits thereof), by reason of any right or title which shall not have first accrued and grown within sixty years before the commencement of the suit; unless the Crown, or those through whom the Crown claims, "shall have been answered, by force and virtue of any such right or title to the same, the rents, revenues, issues, or profits thereof, or the rents, issues, or profits of any honor, manor, or other hereditament, whereof the premises in question shall be part or parcel, within the said space of sixty years; or that the same shall have been duly in charge to his Majesty, or some of his progenitors, predecessors, or ancestors, heirs, or successors, or have or shall have stood insuper of record within the space of sixty years." The act then proceeds to give to adverse possessors for sixty years a title against the Crown and grantees under the Crown. Sects. 2 & 10 define what shall be held to be "being duly in charge;" as to which see, also, *Attorney-General* v. *Lord Eardley*, 8 Price, 39; 1 Daniel, 271: *Attorney-General* v. *Maxwell*, 8 Price, 76, n. Sects. 3 & 4 provide for cases of reversions and remainders vested in the Crown. Sect. 5 enacts, that manors, &c., so gained by adverse possession, shall be held of the Crown upon the same tenure as if they had been had by grants from the Crown; which, in effect, amounts to an exception of services due to the Crown from the operation of the act. Sects. 6, 7, 8, & 9, contain certain reservations and savings of rights.]

St. 9 Geo. 3, c. 16, *Nullum Tempus* Act.

[The effect of the exception of liberties and franchises from the operation of the act is, to leave the majority of cases unprovided for; because there are scarcely any lands not parcel of an honour which remain in the Crown and continue in charge, and the terms of the act do not seem well adapted to include advowsons. As to presuming grants of advowsons from the Crown, see *Gibson* v. *Clark*, 1 Jac. & W. 159. As to tithes, the Crown is limited by the 2 & 3 Will. 4, c. 100, *infra*, p. 54.]

What cases not within the act.

Advowsons.

[The commencement of suit is the issuing of process, and not the filing of the information. (*Att.-Gen.* v. *Hall*, 11 Price, 760).]

Commencement of suit.

[By the stat. 21 Jac. 1, c. 14, s. 1, it is enacted "that whenever the King, &c., hath been or shall be out of possession by the space of twenty years, or shall not have taken the profits of land, &c., within the space of twenty years before any information of intru-

Stat. 21 Jac. 1, c. 14.

Limitation of rights of grantees from the Crown.

STATUTE OF LIMITATIONS AGAINST THE CROWN.

sion brought to recover the same, in every such case the defendant may plead the general issue, and shall not be pressed to plead specially; and that, in such cases, the defendant shall retain the possession he had at the time of the information exhibited, until the title be tried, found, or adjudged for the King." Upon this enactment it was held, that a purchaser of a manor, part of the demesnes of the Crown, from the commissioners of woods and forests, under the stat. 37 Geo, 3, c. 97, s. 6, could not recover, in ejectment, a portion of the waste of the manor which had been inclosed by a subject, and enjoyed for more than twenty years previous to the purchase, although the rights of the Crown had not been barred. The Court was of opinion that the commissioners had not power to sell any part of the Crown land so situated. *Doe* d. *Wall* v. *Morris*, 2 Scott, 276.]

Limitation against the Crown claiming through a subject.

[The Crown claiming through a subject is bound by the Statute of Limitations, if the subject was barred before the title of the Crown commenced. This was decided upon an extent in aid, in the case of *Rex* v. *Morrall*, 6 Price, 24.]

LIMITATION AND PRESCRIPTION: MODUS DECIMANDI.

Lord *Tenterden's* Act, 2 & 3 Will. 4, c. 100.

Royal assent, 9th Aug. 1832.

[The statute 2 & 3 Will. 4, c. 71, intituted "An Act for shortening the Time of Prescription in certain Cases," is fully stated and commented upon, *infra*, Vol. 4, pp. 151, 659. The only statutes connected with this part of the subject which have yet to be noticed, are those relating to claims of *Modus Decimandi* and exemption from tithes. Of these the first is the statute 2 & 3 Will. 4, c. 100, intituled "An Act for shortening the time required in Claims of *Modus Decimandi*, or Exemption from or Discharge of Tithes," which after reciting enacts,

What prescriptions and claims of modus decimandi to be valid in law.

"That all *prescriptions* and *claims* of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence shewing in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and, in cases of claim to exemption or discharge, shewing the enjoyment of the land without payment or render of tithes, money or other matter in lieu thereof, for the full period of thirty years next before the time of such demand; unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in

amount, quality, or quantity from the *modus* claimed, or, in case of claim to exemption or discharge, the render or payment of tithes or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render or *modus* was made, or enjoyment had by some consent or agreement, expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of *modus* made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that, if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to shew such payment or render of modus made or enjoyment had, (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing."

Proviso.

Sect. 2. "That every composition for tithes which hath been made or confirmed by the decree of any Court of Equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confirmed and made valid in law; and that no *modus*, exemption, or discharge, shall be deemed to be within the provisions of this act, unless such

What compositions for tithes shall be considered valid.

LIMITATION AND PRESCRIPTION: MODUS DECIMANDI.

modus, exemption, or discharge, shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act."

The act not available in any suit now commenced, &c.

Sect. 3. Provides, "That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of Parliament, or within one year from the end thereof."

To what cases this act shall not extend.

Sect. 4. Provides, "That this act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments, shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition."

Time during which lands shall be held by persons entitled to the tithes thereof to be excluded in the computation under this act;

Sect. 5. Provides, "That, where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned."

as also the time during which any person capable of resisting any claim shall be an infant, &c.

Sect. 6. Provides, "That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

What it shall be sufficient to allege in actions

Sect. 7. "That, in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the

modus or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed."

commenced under this act.

Sect. 8. "That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim."

No presumption allowed in support of any claim for any less period than mentioned in this act.

Sect. 9. "That this act shall not extend to Scotland or Ireland."

Act to extend to England only.

[After the passing of the above act, it was soon found necessary to restrain the zeal of incumbents in behalf of there successors and to impose further restrictions upon the right of suing in respect of tithes, and the following act of the 4 & 5 Will. 4, c. 83, was passed:]

Sect. 1. "Whereas, by an act passed in the third year of the reign of his present Majesty, intituled "An Act for shortening the Time required in Claims of *Modus Decimandi*, or Exemption from or Discharge of Tithes," certain provisions were made limiting the period within which in cases of claims of a *modus decimandi* the payment or render of such *modus*, and in cases of claim of or to any exemption from or discharge of tithes by composition real or otherwise the enjoyment of the land without payment or render of tithes or money, or other matter in lieu thereof, shall be shewn to have taken place: And whereas it was by the said act further enacted, that nothing therein contained should be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters therein mentioned, then commenced, or which might be thereafter commenced during the then session of Parliament or within one year from the end thereof: And whereas, since the passing of the said act, a great number of suits have been instituted for the recovery of tithes, under the apprehension on the part of the plaintiffs that they would be precluded by the said act from recovering the tithes to which they claim to be entitled, unless they prosecuted their claims within the periods limited by the said act: And whereas it is deemed advisable to enable the defendants in such

4 & 5 Will. 4, c. 83.
Royal Assent, 15th August, 1834.
2 & 3 Will. 4, c. 100.

LIMITATION AND PRESCRIPTION: MODUS DECIMANDI.

suits to cause all further proceedings therein to be suspended until the end of the next session of Parliament, upon the terms hereinafter expressed: Be it therefore enacted by the King's most excellent Majesty by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled and by the authority of the same, That from and after the passing of this act it shall and may be lawful for the defendant or defendants in any action or suit which may have been commenced or instituted since the passing of the said recited act for the recovery of tithes, or for invalidating claims of a *modus decimandi*, or an exemption from or discharge of tithes, for lands in respect whereof no tithes, nor any composition in lieu thereof, shall have been actually rendered or paid within the space of sixty years previous to the passing of this act, with the consent of the plaintiff or plaintiffs in such action or suit, to pay the amount of the costs and expenses (to be taxed as between party and party) which may have been incurred by or on the part of the plaintiff or plaintiffs in such action or suit into the Bank of England, in the name and with the privity of the accountant-general of the Court of Chancery or of the Court of Exchequer, or of the proper officer of the Court in which such action or suit shall have been brought, to the credit or on account of such action or suit; and in every case where such costs and expenses shall be so paid into Court, all further proceedings in such action or suit (except as hereinafter provided) shall be stayed and suspended until the end of the next session of Parliament."

Proceedings stayed on defendant's paying costs into court.

Sect. 2. "That from and after the end of the next session of Parliament, it shall and may be lawful for the plaintiff or plaintiffs in any action or suit, in which the defendant or defendants shall have caused the proceedings to be stayed or suspended under the provision hereinbefore contained, to give notice to the defendant or defendants of his, her, or their intention to proceed in such action or suit, and to proceed therewith accordingly; and then and in every such case the defendant or defendants shall, immediately after such notice shall have been so given, be entitled to receive out of Court the sum or sums which such defendant or defendants shall have previously paid into Court on account of the costs of the plaintiff or plaintiffs."

Plaintiff may give notice to defendant of his intention to proceed; in which case the defendant may have his costs out of court.

Sect. 3. Provides, "That it shall and may be lawful for the plaintiff or plaintiffs in any action or suit in which the defendant or defendants shall have paid into Court the costs of such plaintiff or plaintiffs under the provision hereinbefore contained, to take the sum or sums which may have been so paid for such costs out of

If plaintiff accepts the costs all proceedings to be abandoned.

Court, for his, her, or their own use, and then and in every such case all further proceedings in such action or suit shall be for ever abandoned and relinquished."

LIMITATION AND PRESCRIPTION: MODUS DECIMANDI.

Sect. 4. "That it shall and may be lawful for the successors, heirs, executors, administrators, or assigns of any plaintiff or plaintiffs, whose action or suit may be so stayed or suspended as aforesaid, to revive and proceed with such action or suit after the end of the next session of Parliament, or to take such costs as aforesaid out of Court, and cause all further proceedings to be abandoned and relinquished, in the same manner and in every respect as the original plaintiff or plaintiffs might or could have done."

Successors, heirs, &c., may act in case of death.

Sect. 5. Provides, "That notwithstanding the provision hereinbefore contained, it shall and may be lawful for any party to any action or suit so suspended, upon adducing sufficient proof to the satisfaction of a judge of the Court in which such action or suit shall have been commenced, that there is danger of some material evidence in support of the right or claim of such party being lost in consequence of such suspension, to proceed in such action or suit to the extent of proving such fact or facts, the evidence respecting which shall be so shewn as aforesaid to be in danger of being lost through such suspense."

Judges may, upon sufficient cause shewn, permit actions to be proceeded with.

Sect. 6. Provides, "That nothing in this act contained shall prevent the prosecution of any suit in law or equity for the recovery of any tithes claimed or demanded previous to the passing of the said recited act, or for the recovery of the value thereof."

As to previous claims.

[See also the "Tithe Commutation Act," 6 & 7 Will. 4, c. 71, ss. 44, 45.]

COMMENCEMENT OF THE ABSTRACT.

COMMENCEMENT OF THE ABSTRACT.

[J. Opinions seem to be divided on the point, whether the recent Statute of Limitations has abridged the right of purchasers to a sixty years' title. Sir Edward Sudgen considers that it will reduce the term of a marketable title to forty years, this being the period when, under the new act, an adverse possession will confer an indefeasible title. (*Vide* 2 Sugd. Vend. 10th ed. 132). On the other hand, Mr. *Brodie* and Mr. *Hayes* contend, that the existing rule will remain unchanged; (1 Hayes's Introd. Conv. p. 280, 5th ed.); because, having regard to the case of a subsisting tenancy for life, (during which, as the possession is not adverse to, time does not begin to run against, the remainderman), an uninterrupted enjoyment for forty years does not, even under the new law, afford ade-

Whether the new Statute of Limitations affects a purchaser's right to a sixty years' title.

COMMENCEMENT OF THE ABSTRACT.

Sixty years' title.

quate security against eviction (*h*). Mr. *Brodie* observes, that it is a mistake to suppose that the present length of abstracts is with reference to the limitation of sixty years;—it is with reference to the duration of human life; and so long as the law will not allow a remainderman expectant on an estate for life to be barred by a possession adverse to the tenant for life, a purchaser will be entitled to require a title to be shewn for the same period as heretofore under the old law. *Vide* Hayes's Introd. Conv. App. 564, 5th ed.[J.]]

[[J.] With this opinion the practice of the profession seems to accord; and Courts of equity, or at least their officers, the Masters, continue to act upon the old rule, without any relaxation. One feels, however, some hesitation in acceding to the notion, that the rule in question was established in reference exclusively to the duration of human life, without regard to the limitation of real actions; seeing the exact correspondence between the periods of title and limitation, and that the rule, if framed with a view to the claim of a remainderman, falls short of its aim, as even an estate for life (to say nothing of an estate tail) may outlast the period of sixty years. The probability is, that when it became necessary to establish the minimum extent (*i*) to which abstracts of title under all circumstances should reach, sixty years were fixed on as being the period when an adverse possession would confer an unimpeachable title, *with little or no regard to the case of a tenancy for life or a tenancy in tail, either of which would evidently have suggested the necessity of a more extended range of investigation.* Indeed, as an estate tail is of indefinite duration, no length of time could reach such a case; and therefore the recent statute has wisely included tenants

Eviction possible after a possession of more than forty years.

(*h*) [[J.] Eviction may occur after a possession of much more extended duration than forty years under such circumstances as the following:—Lands are devised by will to A. by words which are considered to carry the inheritance. A. sells and conveys (as is supposed) the fee simple. For more than sixty years the property is enjoyed under this conveyance, A. being alive throughout this period, but, on his death at an advanced age, the purchaser in possession is roused from his dream of fancied security by an ejectment on the part of the testator's heir-at-law, who claims and recovers the property on the ground that A., according to the true construction of the will, was devisee for life only, which claim, being made within twenty years after A.'s decease, would be consistent with the recent no less than the old Statute of Limitations. Supposing the conveyance by the devisee not to disclose the infirmity of his title, it is quite possible that the evicted purchaser may have been coerced into the specific performance of the contract by the decree of a Court of equity, for, after sixty years' possession, a title under such conveyance would be clearly marketable. [J.]]

(*i*) [[J.] Sixty years may or may not be a sufficient root of title, according to circumstances; but no circumstance can render a shorter title marketable. *Vide infra*, p. 61, *et seq.* [J.]]

in tail and ulterior remaindermen in the same bar. *Vide* stat. 3 & 4 Will. 4, c. 27, ss. 22 and 23.J.]

COMMENCEMENT OF THE ABSTRACT.

[J. But though a consideration of the possible existence of remainders may not have had so large a share as has been ascribed to it in the establishment of the present doctrine respecting titles, it may constitute a sufficient ground for adhering to it; for if that doctrine has hitherto left a purchaser in too precarious a condition, now is the time to augment his security by refusing to contract the period of title in analogy to the abridged remedy. Had the present rule afforded ample protection under the old Statute of Limitations, it is obvious that the approaching alteration of the law would have warranted and required its modification; but the truth seems to be, that a purchaser's scope of inquiry ought never to have been limited to the mere period when an adverse possession could ripen into a rightful title (*k*), but should have extended *additionally* over such a period as would comprehend a life in being, or rather the period which the law allows for the suspension of the vesting of estates; because, *until the termination of such period the possession may not have become adverse.* It seems, then, that the rule against perpetuities forms one of the strongholds of a purchaser's security; and as, under that rule, it may happen that a limited and terminable ownership may subsist for more than sixty years, (namely, for a life and twenty-one years), it is impossible, without hazard of doing injustice, to pronounce a title of shorter duration than sixty years to be marketable. Still, however, it cannot be denied, that with such a title a purchaser will now be in a better situation than formerly, and hence, probably, there will be some abatement of that strictness of requisition in regard to evidence of title, which has prevailed of late years, and has driven vendors to the countervailing expedient of introducing stipulations restrictive of a purchaser's demands;—and it must be borne in mind that a purchaser not so restricted may always compel the disclosure of every document of title, however ancient, in the vendor's possession.J.]

Sixty years' title.

[When it is said that a title commencing sixty years back is sufficient, it must be understood that a title to the possession is meant; for the argument in favour of the title is founded on the conformity of the possession during sixty years with the early assurances. But no inference in favour of the title to a reversion arises

Title to a reversion.

(*k*) [To shew the vice of the argument that would regulate the length of abstracts by reference to the period of limitation exclusively, let it be applied to an extreme case, and suppose that the ultimate period of limitation had been fixed at five instead of forty years: it could not be contended that the investigation of titles should be circumscribed by the same limits.]

COMMENCEMENT OF THE ABSTRACT.

from lapse of time; and, therefore, however remote may be the origin of a reversionary estate, its creation must be shewn, and the subsequent enjoyment of the possession under the instrument must be regularly established.]

What a sufficient root of title.

[J. If nothing appear on the face of the deeds comprised within the period of sixty years, (assuming that that is the period through which a purchaser is entitled to investigate the title), which throws a reasonable doubt or suspicion on the anterior title, the want of the prior instruments, though referred to or recited in the abstracted deeds, is not material. This point, which had much divided the opinion of the profession, was decided in the case of *Prosser* v. *Watts*, 6 Madd. 59, the circumstances of which were as follows:—

Loss of recited deeds more than sixty years old, no objection to the title.

A conveyance, dated in 1753, under which there had ever since been an undisturbed possession, recited certain prior deeds as matters of title. The vendor had not in his possession or power the deeds recited or copies of them, and was unable to give any evidence as to what was become of them. The purchaser, for this reason, objected to the performance of his contract, alleging that the recital affected him with constructive notice of the contents of the deeds, and that he could not safely complete his purchase without seeing that the deeds confirmed the title.J.]

[J. Sir *J. Leach*, V. C.:—"There is no dispute, that the recital of a deed is constructive notice of its contents; but to say that a purchaser is not to complete his contract unless he has the actual inspection of every deed of which he has constructive notice, by recital, would lead to a practical inconvenience, which would be manifestly absurd. In some families title deeds are preserved for centuries, and if the earliest of these deeds (*l*) recites a former instrument made five hundred years since, but not now existing, it would be absurd to say, that a contract is not to be enforced against a purchaser because that deed cannot be produced. There must of necessity, therefore, be some practical limit to the operation of this objection; and the true inquiry seems to be in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendors. *Primâ facie*, it is to be presumed, that the purchaser in the ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents; and further, it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no

(*l*) [J. His Honor here evidently assumed, that a vendor's abstract necessarily commences with the earliest deed in his possession, an assumption which bears upon a point discussed in the sequel J.]

COMMENCEMENT OF THE ABSTRACT.

circumstance to repel these general presumptions, and when the title under the conveyance which contains the recital is fortified by sixty years' undisputed possession, I think it a good practical rule to hold, that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, and that the purchaser must complete his purchase."[J.]

Semble.—A vendor bound to produce all the deeds in his possession.

[J. The doctrine of this case is very important. It must not, however, be considered as deciding that, where the vendor has in his possession recited deeds, bearing date more than sixty years ago, he is not bound to produce them, but merely, that the absence of such deeds forms no objection to the title. Indeed, it is apprehended, that a vendor in any case is not justified in withholding documents in his possession relating to the property sold, whatever be their antiquity, and whether subsequently recited or not. The practice does not quite accord with this statement of the rule; for, in preparing the abstract of title, the vendor's solicitor usually selects such of the deeds as shew a sixty years' title, conceiving that it is not incumbent on him to produce or notice the prior deeds, unless the abstracted deeds refer to them.J.]

[J. Sometimes a course still more indefensible is pursued, namely, that of suppressing intermediate deeds, which are supposed, in event, to have become immaterial to the title, as, where a mortgage has been paid off and the estate reconveyed; in which case the deeds of mortgage and reconveyance are laid aside, under the notion that the parties are placed *in statu quo* by the reconveyance, and from an anxiety to keep out of sight the circumstance of the mortgagor having encumbered the property. But the notion is often erroneous, and the practice very improper; the revocation of a will, or some other effect extremely important to the title, might have been produced by the suppressed deed. The only fair course is, to set out all the deeds in the vendor's possession, leaving the purchaser's counsel to judge of their materiality and effect. In confirmation of the preceding remarks as to a vendor's obligation to produce the early deeds, it may be observed, that, in a suit between a vendor and purchaser for enforcing the performance of the contract, under the usual reference to the Master respecting the title, the vendor is obliged, when he produces the deeds, explicitly to declare upon oath that they are all the deeds in his possession. Hence, it seems a prudent precaution for a vendor who has very early deeds in his possession, the production of which, even if they do not create difficulties in the title, may be attended with great expense, to protect

COMMENCEMENT OF THE ABSTRACT.

himself by express stipulation against being called upon to produce them.']

Whether vendor must abstract all the deeds in his possession.

[The liability of the vendor to abstract *all* the documents in his possession, is a point upon which opinions are not settled. Sir Edward Sugden (who writes, it will be remembered, upon the assumption that a forty years' title is marketable) says, "In the general run of cases the vendor will be in possession of documents spreading over sixty years; and then the question arises, is the seller bound to abstract them? A seller ought not to stickle overmuch upon this point, where the prior title would not lead to much expense; but if a clear title is shewn for forty [sixty] years, without anything upon the face of it to lead to an inference that it is derived under a tenant for life, I should apprehend that the purchaser would be compelled to accept it; but he would be entitled, if he pleased, to look at the earlier deeds, although he could not require an abstract of them, to see that the title was not derived under a tenant for life.——But where the seller is in possession of earlier documents, clearly he could not withhold them, proving his title by possession, grants of leases, and the like, and then commence with deeds or wills *within* forty [sixty] years. The title should always commence with a document *if the seller have one*, and a purchaser can insist upon it." 2 Vend. and P. 138. In another part of the work, the learned writer expresses this opinion in still stronger terms. "There is no pretence for a purchaser requiring, or a seller's solicitor furnishing, an abstract of all the deeds in his possession, however ancient. This is never done by a respectable solicitor, and could not be justified; nor could a purchaser insist upon such an abstract." Id. 58. See, to the same effect, Mr. Hayes's opinion upon a claim of this kind recently raised by a purchaser, 1 Introd. Conv. 566, 5th ed.]

Purchaser may *inspect* earlier deeds.

[Upon the whole, perhaps, wherever a document which refers to earlier interests, in the vendor's possession, would form a satisfactory commencement of the abstract, if there were no earlier documents, the most prudent course will be to abstract the earlier documents rapidly and concisely, by way of introduction, so that the abstract shall commence, in point of form and detail, with the more modern assurance. Such a mode of procedure, if judiciously executed, will often satisfy the purchaser's counsel, and prevent the trouble and expense which might be caused by his raising the question as to the purchaser's right to have all the deeds fully abstracted.]

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[The most satisfactory document with which an abstract can commence is a purchase or mortgage deed, from which, under ordinary circumstances, it may be presumed that the state of the ownership was then investigated, and a title deduced during the preceding sixty years; a presumption, however, which, in the case of a purchase deed, by no means implies a perfect title; for there may have been special stipulations, indemnities, and abatements for apparent defects, all of which a purchaser takes care to keep out of sight. A mortgage deed, if the security does not appear to have been taken for an existing debt, is more satisfactory in this respect than a purchase deed, as such a transaction can never be the subject of special stipulations as to title, and a mortgagee will not lend his money without strictly scrutinizing the offered security.]

Whether, where a title commences with a conveyance by an heir-at-law, the ancestor's intestacy ought to be proved.

[J. If the abstract of title commence with a conveyance by a person described as heir-at-law of the last owner, the purchaser may, it is said, require proof of the ancestor's intestacy. 1 Sugd. Vend. 8th ed. p. 305. The point, however, seems doubtful; for if the deed in which the statement is contained is more than sixty years old, the principle of Sir *J. Leach's* decision in *Prosser* v. *Watts* strongly applies. According to that principle it may be contended that, since there must be some limit to the rule requiring evidence in support of recited facts, it is reasonable to say, that, if the statement throws no suspicion on the anterior title, the absence of corroborative evidence is not material. If the intestacy of the ancestor is to be proved, by parity of reasoning, the heirship of the grantor ought also in most cases to be proved; and the evidence would be requisite, as well where the title commenced two or three centuries ago, (a case which, under the rule just discussed, requiring a vendor to produce all his deeds, must sometimes happen), as where a bare sixty years' title is deduced. Besides, there is an incongruity in saying that a sixty years' title, which leaves the purchaser totally in the dark as to its earliest history, is sufficient: but that a deduction of title for sixty years, accompanied with a statement of anterior facts, which, if true, strengthens the title, is not sufficient, for want of corroborative evidence; for statement without evidence is surely as good, at the lowest possible estimate, as neither statement nor evidence. The principle is important, not only in regard to this particular point, but in regard to other questions.J.] [In the last edition of his work, Sir *E. Sugden* has qualified his proposition, and states, that the vendor is bound to produce proof of the ancestor's intestacy only in case he has the evidence in his possession; observing, that in truth the object of the purchaser's inquiry is to

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ascertain whether, to the seller's knowledge, there was a will. See *Cottrell* v. *Watkins*, 1 Beav. 361, where the title relied upon in 1839 was a devise to *Watkins*, (the party in possession), by the will of Lloyd, who died in 1812, and beyond the will no documentary evidence was produced; but there was an affidavit by a gentleman who had acted as solicitor for Lloyd for twenty years preceding his death, that during that time Lloyd was in possession of the property as owner in fee simple, and that the deponent believed him to be such; that it was an old family estate, belonging to, and in the possession of, Lloyd's father during the whole of his lifetime, as the deponent had heard and believed; that on the death of Lloyd he perused his deeds, but no document relating to the estate was found, and no assurance could now be found to evidence the seisin of Lloyd; that he had examined the land-tax assessments, which were very imperfect, and had found Lloyd's name as proprietor, and Price's name as occupier, during the years 1799, 1801, 1802, 1805, 1809, and 1810. There was evidence of reputation to the same effect by neighbours, extending nearly sixty years back. Lord *Langdale*, M. R.—"I think that the evidence here is not sufficient, because it rests upon information and belief; I am perfectly satisfied that there are good titles in which the origin cannot be shewn by any deed or will; but then you must shew something that is satisfactory to the mind of the Court, that there has been such a long uninterrupted possession, enjoyment, and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple. Now it rests upon the information and belief of this gentleman, without stating the circumstances upon which his information and belief rest. I think he ought to have stated the circumstances, to have enabled the Court to judge of them; not to state his belief, but to bring to the Court the means of founding a presumption. I do not think that the evidence here is sufficient."

As to title under adverse possession by mortgagee.

[J. Whether a person would be compelled to take a title gained under the Statute of Limitations, by long possession by a mortgagee without acknowledgment, is not clear. The objection to it is, that the fact upon which its validity depends, namely, the non-recognition of the mortgage debt, is not susceptible of positive proof, and there may have been disabilities in the mortgagor keeping alive the right of redemption. There is consequently ground to contend, that the case falls within the principle upon which it has been held, that a conveyance by a trader after an act of bankruptcy cannot be forced on the acceptance of a purchaser, although it is asserted, that he owed no debt on which a commission could issue, it being

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impossible to prove the fact. In *Stephens* v. *Bridges*, 6 Madd. 66, a bill was filed, to enforce the performance of a contract for the sale of an estate held under a mortgage title; but no objection appears to have been made to the title on this ground.[J.] [In the case of *Cooper* v. *Emery*, 1 Hayes's Introd. to Conv. 274, 5th ed., a title of this kind was forced on a purchaser.]

What a proper commencement of the abstract.

[Where an assurance depends for its validity upon something which had been previously done, the whole transaction should appear upon the abstract, although by so doing it may be carried beyond the period of sixty years. Thus, an appointment should not be abstracted without previously shewing the creation of the power, and the ceremonies requisite to the valid exercise of it; nor a post-nuptial settlement executed in pursuance of articles antecedent to the marriage, without first abstracting the articles at length, that it may be seen whether or not the settlement is in conformity with them, especially when the settlement betrays traces of an unskilful hand. There are few tasks of greater delicacy than the framing of a settlement in pursuance of marriage articles, often imperfect and drawn up in haste and inartificially. The admittance of a party to copyholds, in pursuance of a surrender, must be preceded by shewing that there was a surrender which authorized such admittance. So the abstract of a recovery deed should be preceded by that of the deed creating the entail, although the loss of such deed, and the want of evidence of its contents, is not necessarily an available objection to the title. *Coussmaker* v. *Sewell*, Sugd. Vend., App. No. 15. Such evidence is particularly important in the case of a fine levied by a widow tenant in tail, in order that it may be seen whether she took her estate *ex provisione viri*. When the deeds themselves cannot be produced, recitals of their contents in subsequent deeds form the best substitute.]

Appointment.

Settlement.

Admittance to copyholds.

Recovery.

Fine.

[Where the abstract stated a fine levied in 1741, by J. Cooke and Isabella his wife, and a recital in the will of J. Cooke in 1743, that "his wife had passed a fine of all her estates at T., and had settled the same in trustees, and had given them a power to raise £400, and to make the said estate chargeable with the payment thereof;" and the abstract further stated a mortgage in fee by Isabella Cooke, in May, 1746, after her husband's death, and a conveyance in the following month by her to a tenant to the præcipe, followed by a recovery; after which Sir Sidney S. Smyth (who became one of the Barons of the Court of Exchequer) took a transfer of the mortgage, and advanced a further sum. The title

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was regularly deduced from the mortgagor; but it was objected, that the recovery raised an inference that an estate tail had previously existed, which was not barred by the recovery, for want of a legal tenant to the præcipe. Lord *Eldon*, in deciding against the objection, said: "The will of J. Cooke, in 1743, is evidence that under some fine there was a settlement in trustees; but whether the legal estate vested in them, or merely a power given to raise a charge on the estate, does not appear. Although the expressions are inaccurate, the presumption seems to me to be, that the legal estate was vested in the trustees. The settlement is not noticed in the deed to lead the uses of the recovery; but although there is no doubt that many recoveries have been suffered unnecessarily, it is reasonable to suppose that this recovery was suffered with reference to the settlement. If, then, the legal estate was in the trustees, the mortgage in fee conveyed only an equitable estate, and then a good equitable recovery might be suffered of the secondary equitable estate, without the concurrence of the mortgagee. At the time of the transfer to Sir S. S. Smyth, there is no evidence that he had all the antecedent instruments before him, but it is a strong thing to say that the title was not examined. We ought to give credit to men of eminence in the profession, who were dealing for their own security, and therefore must conceive that the title was not accepted without foundation." *Nouaille* v. *Greenwood*, Turn. & R. 26.]

[Nor is it necessary that, in a title depending on an assurance by a tenant in tail, the entail and remainders should have been destroyed by recovery; for although that form of assurance has a more universal effect in destroying remainders and charges affecting them, a purchaser cannot refuse to accept a fee acquired by the merger of a base fee under a fine, in the immediate reversion or remainder, unless he can shew the existence of some incumbrance on the reversion, which of course the fine would not reach. *Sperling* v. *Trevor*, 7 Ves. 496.]

Titles under grants from the Crown.

[Reversions and remainders in the Crown were not destructible by recovery, nor can they now be barred by an enrolled assurance; and it is therefore necessary, in deducing a title under a grant from the Crown, to set forth the original grant, in order that it may be seen whether any interest remains in the Crown or not, or whether any rent, condition, or service, has been reserved. As to the limitation of the rights of the Crown, *vide ante*, p. 52.]

Advowsons.

[The extreme period within which an advowson may be recovered

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against a party adversely exercising it, is a hundred years; and that period at least must be covered by the abstract of title to an advowson.]

As to titles derived under old leases.

[J. Where an estate is held under a lease of great antiquity, a vendor, it is conceived, could only be required to shew the creation of the term, and to deduce the title for the last sixty years; and it would not be incumbent on him to trace its history, uninterruptedly, from the origin of the lease down to the immediate transaction; and, surely, in such a case, the requisition of the production of the lessor's title could not be supported; though it was thought, by one learned equity Judge, that the antiquity of the lease made no difference in regard to this requisition. Even the absence of the deed creating the term will not, in the opinion of some gentlemen at least, render the title unmarketable. See 1 Prest. Abs. 11. J.]

Time does not run against an administrator, except from the grant of administration.

[One danger which formerly attended the titles of leasehold estates, the possibility of the representative to a deceased owner having been dormant for many years, from the neglect of any person to obtain administration to his effects, no longer exists; the recent Statute of Limitations having enacted, that time shall run against an administrator during the dormancy of the representation. (Sect. 6, *ante*, p. 11).]

Title to renewable leases.

[The well-known rule, that a renewal of a lease by a trustee or person entitled for a partial interest shall enure for the advantage of all who were beneficially interested in the former lease, gives rise to great embarrassment in titles to property of this description; for it is usual to state in the new lease the surrender of the former lease, the production of which the purchaser would be entitled to require, the reference to it being notice to him of its contents. See *Coppin* v. *Fernyhough*, 2 Br. C. C. 291, and 2 Sugd. Vend. 150, 10th ed. And by parity of reasoning, if such lease contained, as it probably would, a similar reference to a prior lease, the prior lease must also be produced, and so on to the original lease. With this requisition it is not often in the power of the vendor to comply, as the surrendered leases are given up to the lessor. In such cases it will be necessary to make out the history of the title to the surrendered leases, and carry it back to the same period that would have been proper had the lease which is the subject of sale been the original lease.]

[Titles to renewable leases are also defective in the legal title. The restraining statute, 32 Hen. 8, c. 28, merely makes a lease granted contrary to its provisions voidable by the successor, and inflicts no penalty on the grantor; so that ecclesiastical persons

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who renew leases, are not generally very careful to ascertain that the legal estate in the subsisting lease is vested in the person who affects to surrender it, and hence the legal estate is sometimes left outstanding for more than a year after the grant of the new lease, which is thus invalidated.]

As to proving the execution of a lease.

[The general rule is, that after acceptance of the abstract the purchaser cannot, at a trial at law, require the deeds to be proved by the witnesses. He is supposed to assume the deeds to be such as on the face of them they appear to be, and the only matter in dispute being as to what may be their legal effect, the necessity of formal proof is dispensed with, and he cannot turn round at the trial and dispute their genuineness. Whether this rule would, under ordinary circumstances, extend to excuse the vendor of a leasehold from proving the execution of the lease in an action at law to enforce the contract, is doubtful; but where the purchaser had returned the abstract immediately upon its being sent to him, stating that he merely bid at the request of the vendor, it was held, in an action against the bidder for loss on a re-sale, that the vendor must prove the execution of the lease in the ordinary way. *Laythoarp* v. *Bryant*, 1 Scott, 327.]

Whether the vendor of leaseholds is bound to produce the lessor's title.

Bishop's lease.

[As to the much litigated point, whether the purchaser of leaseholds is entitled to call for the production of the lessor's title, see 2 Sugd. Vend. & Purch. 10th ed. 140. The case of *Fane* v. *Spencer*, 2 Mer. 430, n., decided, that the purchaser of a bishop's lease was not entitled to call for the lessor's title; but, according to subsequent decisions, this must be considered as an exception to the general rule; that rule being, that the performance of a contract cannot be enforced by a vendor who does not produce his lessor's title. This point, after much consideration, was so decided in the case of *Purvis* v. *Rayer*, 2 Sugd. Vend. & Purch. 145; *S. C.*, 9 Price 488; which was as follows:—An agreement was entered into on the 15th of May, 1819, between J. G. Ravenshaw (as the agent of Purvis) of the one part, and Rayer of the other part; whereby Ravenshaw agreed to sell, and Rayer agreed to purchase a house in Bath, held for the remainder of a term of nine years, under the corporation of Bath and the late Richard Attwood, at the sum of £1500; (the term commenced 1774); an abstract to be made and delivered by Purvis, and the assignment to be at the expense of Rayer. The purchase-money to be paid over before Midsummer, when the deeds were to be signed. The ground-rent, and all outgoings to Midsummer, to be paid by Purvis, from whence the same were to be paid by Rayer. The bill

Contract cannot be enforced by a vendor who does not produce his lessor's title.

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was filed by the seller, and the title was referred to the Master, who reported that the plaintiff could not make a good title. The report was grounded on the non-production of the lessor's title. The plaintiff excepted to the report. Lord Chief Baron *Richards* overruled the exception. His Lordship observed, that the question was, whether, when a man sells a leasehold estate, he could compel the purchaser to take it, without shewing him his title. *White* v. *Foljambe*, 11 Ves. 339, was the first case on this point. There was no case that went the length of shewing that a lessor is not bound to shew his title. This was a lease from a corporation; and the general rule is, that where a vendor offers anything for sale, the vendee is entitled to have the thing he buys, with a moral certainty that he has the thing he buys. If a man sell an inheritance, he must shew a title to the inheritance; so, if a life estate. Then, what is the difference where a lease is sold? It is said, however, that this is an anomalous case; but the law has not said so, nor has it been so considered in any of the decided cases. Then it is objected, that a lessee has not the means of compelling the inspection of his lessor's title; that is true, but furnishes no ground for an exception. A lessee may insist on looking into his lessor's title, or that he should produce it; but if he omits to do so, is that any reason why the vendee of a lease should be deprived of those advantages? Another course is, to state in the advertisement that you cannot shew the title. Therefore, though, after the lease is granted, the lessee cannot compel the production of his lessor's title, there is no reason why the vendee should be put to any risk. Then is there a good title here? The lease is made in 1774; does the length of time make the lease good? Suppose it had been made by a tenant for life; a tenant for life might live for forty-five years; forty-five years' possession would not be good evidence of a title to the inheritance; bnt then it is said, this was a lease by a corporation. His Lordship was of opinion, that there might be circumstances which might make an alteration; but here there was no act of ownership prior to 1774, no prior leases. A tenant for life might have conveyed in fee to a corporation; but, on the death of a tenant for life, the estate would cease. This case, therefore, did not differ from the case of a lease from an individual.J.]

Observation upon *Purvis* v. *Rayer*.

[J. Mr. Price's report of this case contains a similar but more diffuse statement of the grounds of the decision. One of the doctrines advanced by the Lord Chief Baron is open to observation. In regard to the lapse of time since the commencement of the lease, his Lordship is made to say: "The lease itself, which was the subject

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of the contract, was made in 1774, forty-five years since. That is certainly a very long time ago; but that does not make the lease good for any alleged residue of a term, if the lessor had no title to the premises, nor gives any right to the lessee, nor does it affect the contract so as to deprive the purchaser of his natural right to see that he is really buying what was represented to be meant to be sold. Suppose the lease had been made by a tenant for life; the length of possession in that case could not be urged as evidence of a good title, or to shew that the term will continue for any given length of time beyond. *Time of enjoyment, therefore, does not give any greater credit or stability to a claim under a lease of a continuing enjoyment to a future period.* This case is, in that respect, like the common one of incumbents, who are entitled to tithes, receiving successively for a great number of years a sum of money as a composition. In such a case, the lapse of one hundred or one hundred and fifty years does not give any adverse right against the tithe owner. If this had been an estate of inheritance, forty-five years' possession would not be enough, in general, without other circumstances, to furnish an indefeasible right; still less in the case of a lessee, whose length of possession is not of such weight."[J.]

Operation of length of time upon a leasehold title.

[J. It is submitted, however, that though the learned Chief Baron may have been perfectly right in holding, that a purchaser ought not to be compelled to take a lease granted forty-five years ago without an opportunity of investigating the lessor's title, yet it is impossible to accede to the proposition, that length of possession under a lease affords no presumption in favour of its validity. Suppose a lease for five hundred years were granted a hundred years ago, under which there has been undisturbed enjoyment ever since; can it be contended that such enjoyment raises no stronger presumption that the lease wss granted by a person possessed of competent authority, than if the enjoyment under it commenced yesterday? If granted by tenant for life, or any other person having a temporary interest only, it is probable that such interest would long since have ceased, and that the remaindermen would have presented themselves with their opposing claims. Besides, how far is such a case distinguishable from that of a freehold title? If an abstract commences with a conveyance in fee, made more than sixty years ago, such a conveyance is admitted, on all hands, to be a sufficient root of title, though there is nothing on the face of the deed disclosing the means by which the grantor became entitled to the inheritance; indeed, it is preferred, that the instrument should contain no recital. Now, it is obvious, that the grantor in this con-

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veyance may have been tenant for life only, and may have died very recently, or may be even yet living, so that there may have been no possession adverse to the right of the remainderman; and the case is, therefore, within the scope of the learned Chief Baron's reasoning. It has been thought, however, and wisely thought, that an enjoyment for sixty years, under an instrument professing to grant the fee, raises a reasonable inference that the grantor had power to make such conveyance; and the same inference, it is apprehended, arises in favour of a leasehold title, though, perhaps, not with quite equal force, because lessees are not so much in the habit of scrutinizing the titles of lessors, as the purchasers of the fee simple are those of vendors; which difference, however, let it be observed, is diminished in proportion as the lease is long and beneficial. Whether this consideration will lead to the establishment of a different rule in regard to leaseholds, remains to be decided. If sixty years' uninterrupted possession under a lease is not to be considered as conclusive evidence of the right of the lessor to grant it, then an enjoyment of a century would be equally inconclusive; for it seems impossible to draw an intermediate line.[J.]

[J. But though equity will not entertain a suit for specific performance by a vendor, who cannot produce his lessor's title, yet, on the other hand, it is unable to enforce such performance against him, at the instance of the purchaser; as the act required to be performed is not in the vendor's power, but depends upon the will of a third person. To decree, therefore, that he shall specifically perform the contract, by producing the lessor's title, must necessarily have the effect, unless he can obtain the lessor's compliance, of sending him to the Fleet for life. The purchaser, consequently, is reduced to this alternative: he must either dispense with the production of the lessor's title, or abandon the contract altogether; and that, too, it was formerly thought, with the loss of any deposit he might have paid; for it was ruled at Nisi Prius, that a purchaser is not entitled to recover his deposit, on the ground of the non-production of the lessor's title. (*George* v. *Pritchard*, coram Lord *Tenterden*, 1 Ry. & Moo, 417).J.]

Deposit recoverable by purchaser for non-production of lessor's title.

[This decision has, however, been overruled by the Court of King's Bench; and it has been decided, that unless there be a stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity; and this is not

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rebutted by any presumption as to the intention of the parties, deducible from the small portion of the time remaining unexpired, the small value of the property or the absence of any premium for the lease. (*Souter* v. *Drake*, 3 Nev. & Man. 40; 5 B. & Adol. 992). This was an action by the seller against the purchaser for not performing his contract; but, as it was held that the contract could not be enforced at law unless the vendor performed his implied agreement to shew the lessor's title, it follows that he must return the deposit paid in faith of his performing it.]

[Wherever the vendor of a leasehold does not intend to produce his lessor's title, he should state such intention in the conditions of sale; as to the effect of which see *Shepherd* v. *Keatley*, 1 Cr., Mee. & Ross. 117. If the lease has been made under a power, the purchaser should invariably call for the deed in which the power is contained. As to waiver of the right to production of the lessor's title, see *Haydon* v. *Bell*, 1 Beav. 337: *Warren* v. *Richardson*, 1 Younge, 1.]

[The title to the freehold which must he shewn in the lessor is, of course, the same, and must be carried as far back as if the freehold itself were the subject of sale; but it is only to be brought down to the period when the lease was granted. See *Purvis* v. *Rayer*, *ante*, p. 70.]

Attendant term.

[An attendant term forms part of the title to the equitable inheritance. The creation of the term must be shewn, if possible; but although this is not done, the title cannot be objected to where the time is more than sixty years old, and the evidence of possession during that period accords with the apparent title. With reference to mesne assignments, Mr. Preston observes, that "it is the practice, although the practice is attended with a heavy expense, and certainly is, in some cases, very unjustifiable, to deduce the title through the intermediate period. No part of practice stands more in need of reformation than that which calls for such an expenditure. If a title under the term for years be shewn during a period of thirty or forty years, how can any defect in the title well exist?" (1 Prest. Ab. 25). It is to be observed, that a danger to which the title to a term was formerly exposed, that of a dormant representative to the last true owner, has been removed by the recent Statute of Limitations; (*ante*, p. 11); so that wrongful possession for twenty years will, in all cases not between trustee and *cestui que trust*, confer an indefeasible title. Generally speaking, the courts will presume the fact of mesne assignments having been regularly made. (2 W. Black. 1128).]

CONTENTS, FORM, AND ARRANGEMENT OF THE ABSTRACT.

2. Contents, form, and arrangement of the abstract.

[The most material consideration in the preparing of an abstract is, to give every information which can possibly bear upon the validity of the title, or which may be required for the purpose of framing the recitals, &c., in the conveyance to the purchaser: subject to this all-important requisite, brevity is desirable for the purpose, not only of saving time and trouble to all parties, but of submitting the title to counsel in the most compact form, unembarrassed by extraneous particulars, so that a comprehensive view of the whole may be most easily taken. Mr. Bradley, however, used to say, that abstracts were very seldom made out with sufficient fulness.]

[Care should be taken to make the abstract perfect in the first instance. If the sale is made subject to the very ordinary stipulation, that the vendor shall deliver an abstract within a certain time, and that the purchaser shall make his objections within a certain time, and the vendor delivers an imperfect abstract, the question may arise, whether the second branch of the stipulation is not conditional on the performance of the first; so that the vendor's neglect to deliver a perfect abstract absolves the purchaser from all obligation of making objections within the time specified. See *Hobson* v. *Bell*, 2 Beav. 17: *Tanner* v. *Smith*, Lord Ch., Feb. 1840, 4 Jurist, 310.]

Title under exchange.

[If the property has been derived under a common-law exchange, or an exchange by mutual conveyances with eviction clauses, (*vide infra*, Vol. 4, pp. 3, 5, 6), the title to the estate given in exchange must be shewn from the usual period down to the date of the exchange, unless, in the case of a common-law exchange, it can be proved that the lands given in exchange have been aliened by the other party.]

Title under Inclosure Act.

[The title to an allotment under an Inclosure Act depends, of course, upon the title to the estate in respect of which the allotment was made; although the tenure of the allotment is always, in the absence of any provision to the contrary in the act, of common socage, whatever may be the tenure of the commoner's estate. *Doe* d. *Sweeting* v. *Hellard*, 9 B. & Cr. 789: *vide infra*, Vol. 8, p. 284 *et seq.*, 2nd ed., and the stat. 6 & 7 Will. 4, c. 115, "for facilitating the Inclosure of open and arable fields in England and Wales."]

[3. An allotment is no evidence that the person to whom it was made was seised in fee, as allotments may be and frequently are made to tenants for life, or other owners of partial estates. Great difficulties in titles derived through Inclosure Acts frequently arise, from the impossibility of determining in respect of which part of the

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lands or common rights, belonging to the allottee at the time of the inclosure, any given portion of the allotment was made. Thus if a person have several open pieces of land held under distinct titles, and an allotment be made to him in general terms in lieu of all his lands in the parish, unless it can be shewn what part of the allotment was made in respect of each piece of open land, it is obvious that no title can be made to any part of the allotment, without deducing the title to the whole of the lands which were subject to the inclosure; and an incumbrance or defect of title affecting any portion of the inclosed lands will affect the *whole* of the allotment, on account of the impossibility of distinguishing the exempted parts. Sometimes the surveys and papers in the hands of the clerk of the peace furnish the requisite information; but frequently they are not accessible. If the title to all the lands of the owner in question which were subject to the operation of the act be well deduced, (evidence, of course, being given that the lands to which a title is shewn *were* all the lands), the title to every part of the allotment will be free from objection. This supposes that the allottee had the fee-simple in all the lands in respect of which the allotment was made, or, at all events, that they were subject to the same limitations, so as to devolve in the same channel. But, where this is not the case, as, if the allottee be owner in fee of Whiteacre, and tenant for life of Blackacre, and an entire allotment be made to him in respect of both those lands, a farther evil ensues: it then becomes necessary, at his death, in order to ascertain the rights of the respective owners to the several parts of the allotment, that those parts should be distinguished; and, if any of the persons entitled to either portion are under any incapacity, this cannot be effected by mutual agreement, but it is necessary to resort to a judicial proceeding. And it seems, (though the contrary has been supposed by a learned writer, who has exposed, with much force, the evils in question, *vide* Coventry on Inclosures, p. 7), that a bill in equity, for ascertaining boundaries, would lie in such a case; an instance of which is afforded in the case of *King* v. *Moody*, 2 Sim. & Stu. 579, where A., who was entitled in fee to a manor, subject to an executory devise over, to arise at his death, having purchased certain freeholds in the parish, and also copyholds of inheritance, parcel of the manor, which were surrendered to him, and thereby became extinguished in the manor, and, consequently, subject to the executory devise, erroneously conceiving himself to be seised in fee-simple of both estates, claimed of the inclosure commissioners one entire allotment for the whole, and the commissioners, acting under the

Effect of indiscriminate allotment, in respect of several lands held under different titles.

Interference of equity to apportion allotments.

same mistake, awarded certain lands to him, in lieu of both estates, describing the allotment to be in respect of lands of which he was seised in fee: the executory devise having taken effect, a bill was filed by the executory devisees, claiming such part of the allotment as was made in respect of the copyholds, and praying that a commission might issue to ascertain it, &c. It was objected, that the allotments having been described in the award as made in lieu of lands of which the allottee was seised in fee simple, evidence was not admissible to the contrary; and also, that the question was a legal one, and therefore, that the plaintiffs should be left to their remedy at law. But Sir *J. Leach*, V. C., overruled both these objections, holding the evidence to be admissible; and that, as the plaintiffs could not recover at law any specific portion of the allotment, they might come into a Court of equity to have the portion to which they were entitled ascertained. The Court, therefore, declared the plaintiffs to be entitled to so much of the allotment professed to be made in respect of the estate in fee of A., as was actually made in respect of the copyhold lands, and referred it to the Master to apportion the allotment accordingly.[J.]

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[J. The evil which the Court was called upon to rectify in this case might have been prevented, and ought always to be prevented, by the claimant to several allotments carrying in before the commissioners a distinct claim for each property.J.]

As to encroachments on wastes.

[J. It frequently happens, that the owners of property adjacent to a common have, from time to time, enlarged their territory by encroachments upon the waste, which, from the negligence arising from the minuteness of the interests of the individuals interested in opposing it, has been tacitly acquiesced in until the possession, originally wrongful, has ripened into an unimpeachable title. The right of entry, both of the lord and commoners, is barred by twenty years' possession. *Creach* v. *Wilmot*, 2 Taunt. 160: see *Hawke* v. *Bacon*, 2 Taunt. 159. It has been held, that an inclosure made from the waste, twelve or thirteen years since, and seen by the steward of the same lord, from time to time, without objection, may be presumed by the jury to have been made with the license of the lord; and an ejectment cannot be brought against the tenant as a trespasser, without a countermand of the presumed license. *Doe* d. *Foley* v. *Wilson*, 11 East, 56.J.] [Where the encroachment had subsisted with the knowledge of the lord during ten years, and the lord then broke down the fences, it was held a sufficient revocation of any license which could be presumed from previous acquiescence, so as to entitle the lord to bring ejectment. *Doe*

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d. *Beck* v. *Heakin*, or *Parker*, 2 Nev. & Per. 660; 6 Ad. & El. 495.]

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[J. In some instances, inclosure commissioners are authorized to treat encroachments which have been made within twenty years as part of the waste, and this power is sometimes extended to encroachments made within sixty years; though usually, in the latter case, the power is confined to calling upon the parties in possession to pay the value of the ground taken, exclusively of building and improvements thereon, but with an alternative power of seizure in case this claim is not satisfied.J.] [See the provisions of the recent statute, 6 & 7 Will. 4, c. 115, "for facilitating the inclosure of open and arable fields in England and Wales," ss. 19, 20, 21, 22, respecting encroachments.] [J. It would be well if all local acts contained a provision of this nature; but, whether they do or not, inclosure commissioners should apply themselves to the task of ascertaining what, if any, recent encroachments have been made before they proceed to divide the common; for persons who have curtailed it in this manner cannot, it should seem, be disturbed after the inclosure is completed; as the rights, both of the lord of the manor and of the commoners, are satisfied and barred by the act, and the commissioners become *functi officio* on the execution of their award. This doctrine, however, admits of an exception in regard to cases in which the convenient execution of the act requires a prolongation of the commissioners' office. Thus, it has been held, that a rate made by commissioners for the completion of the roads four years after the execution of their award was valid, though the act vested in them an express authority in one particular case to rectify a mistake after the execution of the award, which, it was said, shewed that, for all other purposes, the award was to be final. *Haggerstone* v. *Dugmore*, 1 Barn. & Ald. 82.J.] [See the provision in the statute, 3 & 4 Will. 4, c. 87, stated *infra*, p. 81, n., for the appointment of new commissioners.]

Duration of authority of commissioners for inclosures.

[Encroachments from waste land are (like other acquisitions by wrong) of the fee, and descend to the heir of the wrong doer, or, if made by tenant for years, enure to the benefit of the reversioner. *Doe* d. *Pritchard* v. *Jenney*, 8 Car. & P. 99: *Doe* d. *Harrison* v. *Murrell*, Id. 134.]

[As to grants by the lord of portions of the waste of a manor by copy of court roll, see *Northwick* v. *Stanway*, 3 N. R. 346: *Rex* v. *Wilby*, 2 Man. & S. 504: *Rex* v. *Hornchurch*, 2 B. & Al. 189.]

Ownership of waste strips adjoining roads, &c.

[Strips of waste land on the side of an ancient highway, or of a river, are, together with the soil to the centre of the road or bed of the river, presumed to belong to the owner of the adjoining inclosed land. *Steel* v. *Prickett*, 2 Stark. 463: *Cooke* v. *Green*, 11 Price, 736: *Doe* d. *Pring* v. *Pearsey*, 9 Dowl. & Ry. 908; 7 B. & Cr. 304. See *Headlam* v. *Hedley*, Holt, 463. But the presumption may be rebutted by evidence of acts of ownership on the part of the lord of the manor. *Anon.*, Lofft, 358: *Doe* d. *Barrett* v. *Kemp*, 5 Moore & P. 173; affirmed, 2 Scott, 91: *Scoones* v. *Morrell*, 3 Beav. 251. And if the strip of land communicate with open commons or other larger portions of land, the presumption is in favour of their belonging to such commons, &c., rather than to the owner of the adjoining inclosure. *Grose* v. *West*, 7 Taunt. 39. The presumption does not arise in respect of roads set out under modern inclosure acts. *Rex* v. *Edmonton*, 1 M. & Rob. 24: *Rex* v. *Hatfield*, 4 Ad. & El. 156.]

Legal title not in the allottee, until the execution of the award.

[J. Under the General Inclosure Act, the legal title of an allottee is not complete until the execution of the award (*a*); *Farrer* v. *Billing*, 2. Barn. & Ald. 171: see also *Ellis* v. *Arnison*, 3 Dowl. & Ry. 27; 5 Barn. & Ald. 52; 1 B. & Cr. 70; but local acts frequently contain a clause authorizing an allottee to dispose of his allotment before, and which, it seems, enables him to confer a title, which a purchaser would be compelled to accept. *Kingsley* v. *Young*, 17 Ves. 468; *S. C.*, 18 Ves. 207. And the objection, that the commissioners might vary the allotment, would not avail persons who purchased with knowledge of the circumstances, as this is inherent in the nature of the property. Ibid. But if the act do not contain a clause to the effect in question, the fact of the commissioners' award not being executed is a valid ground for purchaser's refusal to perform the contract. *Lowndes* v. *Bray*, 2 Sugd. Vend., 10th ed., 190. J.] [Of course, a conveyance of the estate itself, in respect of which the allotment is subsequently awarded, includes the

(*a*) [The title, under acts of Parliament, depends on the particular language employed; some acts confer a legal title without any formal conveyance. When a company was authorized to purchase land, and the act directed, that, in case of difference, a compensation jury should be empannelled, and that the verdict should be made a record of Quarter Sessions, and upon payment of the sum assessed or agreed upon, the undertakers were authorized to have and enjoy the lands to and for their own use and benefit; and the company took possession of certain lands after payment of the sum assessed; it was held, that the record of Quarter Sessions was a sufficient legal title. *Bruce* v. *Willis*. 3 Nev. & P. 220.]

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right to the allottment. *Doe* d. *Dixon* v. *Willis*, 3 Moore & P. 24.]

[J. But where a local act directed that the commissioners, by notice, might cause all rights of common to be extinguished, and might then allot the waste land amongst the proprietors; and that the owners might fence their allotments after they had been marked, staked out, and confirmed, and before the signing of the award, and might also, within three months *before the execution of the award, sell and convey* their interests in the allotments, the commissioners being thereby authorized to allot to the purchasers, and the latter, *after the execution of the award*, to hold the allotted lands in such manner as the vendor would have done if there had been no sale; provided that, where the allotments were copyhold, the deed should be enrolled in the court rolls of the manor, and that the purchaser should be admitted tenant thereto, at the same time as the other allottees of copyhold lands, *viz.* after the execution of the award; it was held, that this authority to inclose, and so to enjoy in severalty, and the power to sell and convey, might well (considering the language in which that power was given) be enjoyed and exercised without the legal seisin of the land; and that, therefore, these provisions not sufficiently countervailing those of the General Inclosure Act, the legal freehold did not pass to the allottee till after the execution and proclamation of the award. *Farrer* v. *Billing*, 2 B. & Al. 171. J.]

Where the local act provided, "that the several lands *so to be allotted and awarded*, upon the said division and inclosure, to the several persons concerned, and the several messuages, &c., which shall be exchanged, &c., *immediately after such allotments and exchanges* are made, should be, remain, and enure to the several allottees, who should from thenceforth stand and be seised and possessed thereof," &c.; it was held, that an allottee acquired the legal estate immediately upon being put into possession by the commissioners, and before any award was executed. *Doe* d. *Harris* v. *Saunders*, 1 Nev. & Per. 119; 5 Adol. & El. 664. As to exchanges under inclosure acts, see *Wingfield* v. *Tharp*, 10 B. & Cr. 785: *Cox* v. *King*, 4 Scott, 553: *Goodtitle* d. *Baker* v. *Melburne*, 2 Mees. & Welsb. 853; and *infra*, Vol. 4, p. 6. As to what provisions in inclosure acts are directory merely, see *Casamajor* v. *Strode*, 2 Myl. & K. 706.]

Enrolment of award.

[Where the act directed the enrolment of the award within a given time, it was thought that enrolment after that time would

not give validity to the award, and this opinion is countenanced by the statute 3 & 4 Will. 4, c. 87, which gives validity to awards which have not been duly enrolled, and enables any parties interested to enrol such awards; and provides for the appointment of new commissioners in certain cases (*a*). It must be remembered, that this act has no *prospective* operation.]

(*a*) [The act, after reciting the defects which it is intended to remedy, enacts:—

Sect. 1. *Awards not enrolled to be valid.*]—"That every award *already made* and executed under or in pursuance of any act of inclosure, and which has not been enrolled, or which has not been enrolled within the time limited by the act, under or in pursuance of which such award shall have been made, shall, from the time of the execution of such award, be as good and valid and of the same effect in all respects as if such award had been enrolled in the manner, and within the time, if any, appointed and limited for that purpose in the act under and in pursuance of which the same has been made."

Sect. 2. *Proprietors of Land may cause Awards to be enrolled; any Person may have Copy of Enrolment.*]—"That where any award, already made and executed under or in pursuance of any act of inclosure, has not been enrolled, it shall be lawful for any person or persons having or deriving title to any messuages, lands, tenements, and hereditaments, under such award, at his, her, or their expense, to require and cause such award, with any maps or plans annexed or relating thereto, to be enrolled in any one of His Majesty's Courts of record at Westminster, or by the clerk of the peace of the county, riding, division, soke, or place, in which the lands to which such award shall relate are situated, to the end that recourse may be had thereto by any person or persons interested therein, for the inspection and perusal whereof no more than one shilling shall be paid; and a copy of such award when so enrolled, or of any part thereof, signed by the proper officer of the Court wherein the same shall be enrolled, or by the clerk of the peace for such county, &c., or his deputy, purporting the same to be a true copy, shall from time to time be made and delivered by such officer, &c., to any person or persons requesting the same, for which no more shall be paid than three pence for every sheet of seventy-two words; and every award already made, whether enrolled or not, and every copy of such award, when enrolled as aforesaid, or of any part thereof, signed as aforesaid, shall at all times be admitted and allowed in all Courts whatsoever as legal evidence."

Sect. 3. *Acknowledgment by Commissioners dispensed with in certain Cases.*]—"That if any commissioner shall be dead or incapable of acknowledging his award before such award shall be enrolled, the same award may be enrolled without the acknowledgment of such commissioner, on due proof being given that such award is the deed or instrument of such commissioner."

Sect. 4. *Possession of Awards, when deposited.*]—"That where any award already made and executed under or in pursuance of any act of inclosure shall be deposited in any parish church, it shall be considered as in the custody of the officiating minister and churchwardens for the time being of such parish church; and where any such award shall be in the possession of the lord of any manor to or for whom, or to or for any preceding lord of which manor, any allotment shall have been made under such award, or in the possession of the steward of such manor, it shall be considered as in the custody of the lord of such manor for the time being: and the

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[By the stat. 3 & 4 Vict. c. 31, intituled "An act to extend the Powers and Provisions of the several Acts relating to the Inclosure

steward shall, when required, deliver up the same accordingly; and the said minister and churchwardens, or lord, as the case may be, shall from time to time, upon the request of any person or persons interested in any allotment or allotments, or otherwise, under such award, cause the same to be produced for the inspection of such person, or persons, on being paid by him, her, or them, a just and reasonable compensation for such production, and shall also cause the same to be produced for the purpose of being enrolled, or in any Court of law or equity, or on any other occasion, for the purpose of being given in evidence, on being paid all just expenses."

Sect. 5. *Proprietors may require Awards to be deposited in the Church, or with the Lord of the Manor.*]—"That where any such award as aforesaid shall not be deposited in the parish church of the parish in which the lands to which such award shall relate are situated, and shall not be in the possession of the lord or steward of any manor to or for *the present, or any preceding lord of which manor an allotment shall have been made under such award, but shall be in the possession of any other person, it shall be lawful for any person or persons interested in any allotment or allotments, or otherwise, under such award, to require the same to be deposited in the parish church of the parish in which the lands to which such award shall relate are situated; and the person in whose possession the same shall be shall, on such request, deliver up the same to the minister and churchwardens for the time being of such parish church, for the purpose of being so deposited."

* *Sic.*

Sect. 6. *Providing for Appointment of Commissioners, where omitted.*]—"That in all cases where, in or by virtue of any act or acts of inclosure heretofore passed, provision hath been made for the election, nomination, or appointment, within a time therein limited, or directed, of a new commissioner or commissioners, appointed by or by virtue of such act or acts, or of his or their becoming, by reason of absence beyond the seas, or otherwise incapable of acting in the execution of the powers, authorities, and trusts in such commissioner or commissioners vested and reposed, before the same and every of them shall have been fully executed and performed, and where any such election, &c. as aforesaid, or any of them, shall have been neglected or omitted to have been made, pursuant to such act or acts, within the time or times thereby limited or directed, then, and in every such case it shall and may be lawful to and for the person or persons by any such act or acts of inclosure authorised or empowered for that purpose, and on such notice or notices, and at such meeting or meetings (if any) as required or directed by any such act or acts of inclosure, to proceed at any time after the passing of this act to the election &c., of, and to elect &c., in such manner as by such act or acts of inclosure is or are directed, one or more fit and proper person or persons (as the case may require) not interested in the division, allotment, or inclosure by such act or acts of inclosure directed or authorized to be made, and not otherwise disqualified by such act or acts respectively, as a commissioner or commissioners in the room, place, or stead of the commissioner or commissioners so dying, &c., and to do all other acts, matters, and things, which shall be requisite or necessary for effecting the purposes aforesaid, notwithstanding the time so limited or appointed as aforesaid for doing or performing the same shall then have elapsed, and so from time to time as often as any commissioner so to be elected as aforesaid shall die, &c.; and the several writings appointing such new commissioner or commissioners, and all other documents (if any) relative thereto, shall be deposited

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of Open and Arable Fields in England and Wales," it is enacted, amongst other things, that, subject to the right of appeal given by the 6 & 7 Will. 4, c. 115, "all awards that shall be made in pursuance of that act and of this act, or either of them, shall, immeately after the execution thereof, be conclusive evidence that the provisions of the said acts have in all respects been complied with, and no other evidence than such award shall be requisite to establish the title under the inclosure of the parties concerned or interested in the same;" and parties proceeding to inclose or cultivate their allotments are to be deemed to have waived all right of appeal.]

Effect of death of one of the commissioners.

[Where the act has appointed three commissioners, providing that two of the three may act, and the award, &c., are accordingly executed by two only, it must be shewn that the third was living at the time; for the *co-existence* of the full number of commissioners has been held essential to the validity of the acts of a quorum. *Doe* d. *Nicholson* v. *Middleton*, 6 Moore, 532: see *Doe* d. *Read* v. *Godwin*, 1 Dowl. and Ry. 259.]

Title to enfranchised or extinguished copyholds.

[The title to an enfranchised copyhold estate depends upon both the freehold title of the lord, and the customary title of the tenant previously to the enfranchisement, both of which must therefore be shewn. And it may be here observed, that the presumption in favour of the validity of a title which appears to have been good many years back, arises from the agreement of the subsequent enjoyment with such title; and therefore, although the title to the manor subsequent to the enfranchisement is immaterial if the enfranchisement was made by a person who was entitled, yet it will be proper to see that the manor has been since enjoyed conformably to the apparent title at the date of the enfranchisement. If the title has arisen by merger of the copyholder's interest in that of the lord, the prior copyhold title must of course be shewn.]

or disposed of as by such act or acts of inclosure is or are directed, and every commissioner to be elected &c., by virtue of this act to execute the powers, authorities, and trusts of any act or acts of inclosure as aforesaid, having first taken the oath or oaths, and complied with the other terms or conditions (if any) prescribed in and by such act or acts of inclosure, shall have the same powers and authorities, and no others, for putting or carrying into execution such act or acts, as if he had been duly elected, nominated, or appointed for those purposes, within the time limited or directed by such act or acts of inclosure."

Sect. 7. Provides, "That nothing herein contained shall extend to affect any public right, or otherwise to give any greater force or validity to any award already made and executed under or in pursuance of any act of inclosure, than such award would have had if this act had not been made, except so far as respects the several defects hereinbefore respectively specified and provided for."]

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Life and reversionary interests in stock, &c.

[J. In deducing the title to life and reversionary interests in trust monies, an abstract of the deed or will creating the trusts, of course, will be furnished, and which should set forth not only the particular trusts under which the vendor claims, but also the several clauses and provisions by which his interest is liable indirectly to be affected, as powers of advancing portions to children, varying investments, appointing new trustees, &c. If these powers are to be exercised with the consent of the person whose interest is the subject of the sale, it seems to be the better opinion, that, after he has parted with his interest, they cannot be exercised without the concurrence of the transferee; *vide infra*, Vol. 5, p. 171. If the powers in question are, by the terms of the instrument creating them, exercisable without the vendor's concurrence, then the fact of the existence of such powers ought, in fairness, to be communicated to the purchaser; for which purpose an abstract of the deed might be produced at the sale, to which reference should be made in the conditions; and this may be a prudent precaution, even where there is ground to contend that the purchaser's concurrence would be requisite to the due exercise of the power. It is probable, however, that, if the purchaser has notice of the deed or will creating the trust, (as he necessarily has, if the conditions of sale refer to it), he would be bound by all the clauses contained in the deed; and, therefore, it is especially incumbent on him to ascertain what those clauses are. See *Walker* v. *Maunde*, 1 Jac. & W. 183.J.]

What is notice to a purchaser of the contents of deeds, &c.

[But the description must not be so framed as to mislead the purchaser; for an ambiguous reference to the means of obtaining correct information will not excuse such misrepresentation. *Flight* v. *Booth*, 1 Scott, 190: *Dykes* v. *Blake*, 6 Scott, 320. A description of a sum as so much "principal money invested in consols," does not exclude the purchaser from taking a larger sum if the stock sells for more. *Lucas* v. *Bond*, 2 Kee. 136.]

Rights of purchaser of partial interest, in respect of deeds, &c.

[J. The purchaser would be entitled, at the vendor's expense, to an attested copy and covenant for the production of the deed creating the interest sold, and of any other instrument indirectly affecting the fund, as appointments of new trustees, &c., unless the contrary were provided by the conditions. Where the fund is standing in the names of executors, it may be sometimes proper to ascertain that a distinct appropriation, taking it out of the testator's general estate, has been made, and that the legacy duty has been paid. (As to such duty, *vide post*, Vol. 8, p. 370, 1st. ed.)J.]

Title to life policy.

[J. In making out titles to policies of life insurance, there is more difficulty than is generally imagined. Not only is it necessary to

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the validity of the policy, that the age and state of health of the person whose life is assured should correspond with the representations made to the insurance office; but if the insurance is effected on the life, not of the assured himself, but of another person, it ought to be proved that the party effecting it had such an interest in the life at the time, and from thence uninterruptedly to the period of the sale, as is sufficient to validate the insurance; and these facts are so difficult, if not impossible, to be proved, that, if a purchaser is entitled to require such proof, the specific performance of a contract of this nature could scarcely ever be enforced against him.J.] [See *Brealy* v. *Collins*, 1 You. 317.] [J. It has been decided, that the interest requisite to give validity to the insurance of another's life must be a pecuniary interest; so that a policy effected by a father on the life of his son cannot be supported on the mere strength of the parental relationship. *Halford* v. *Kymer*, 10 Barn. & Cr. 724.J.] [*Vide infra*, Vol. 5, p. 302.]

[J. Some of the insurance offices only require evidence of the existence of an interest at the time of effecting the insurance, while others dispense with proof of interest altogether. If the case were otherwise, an insurance on the life of another would be absolutely worthless, without a transfer of the debt or other property creating the interest. The want of power to enforce the demand, of course, renders the interest unmarketable for sale; though it is much less deteriorating in point of fact than formidable in sound, as formal or technical objections are rarely taken to fair claims by the respectable insurance offices.J.] [See *Barber* v. *Money*, 1 Mood. & Rob. 62.] [J. However, a considerable degree of risk is inseparable from property of this description; for, even if the present validity of the policy be well established, the maintenance of its validity is dependent on the continued observance of the conditions by the person whose life is insured, in not going abroad, or entering into military service, &c., and (where the policy is effected by the assured on his own life) is also liable to be defeated even in the hands of a transferee, by his (the assured's) death by duelling, suicide, or the hands of justice; against all which the purchaser can have no other security than the covenant of the person in question, and sometimes he has not even that.J.] [*Vide infra*, Vol. 5, pp. 302, *et seq.* Of course, the purchaser will see that the last premium has been paid. See *Want* v. *Blunt*, 12 East, 183: *Doe* d. *Pitt* v. *Shewin*, 3 Camp. 134.]

All the deeds must be abstracted.

[All the deeds subsequent to that with which the abstract commences must be stated, not excepting any which may be supposed

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to have become immaterial, as mortgages which have been reconveyed, &c. But deeds creating estates, &c., which have expired of themselves, (as leases), may, generally speaking, be safely omitted.]

Evidence to accompany abstract.

[Exact copies of certificates of baptism, marriage, and burial, affidavits, &c., should be supplied; although, if evidence of this kind is voluminous, the result alone needs to be stated in the body of the abstract. Much time would be saved if an abstract were made as complete as possible in these particulars before delivery. The recommendation, however, supposes that it will have been laid before counsel on behalf of the vendor, to advise on the evidence by which it should be accompanied, unless the vendor's solicitor feels competent to take the responsibility upon himself.]

Judgment and Crown debts should be noticed.

[Any judgments or specialty crown debts which are known to affect the vendor should be noticed, excepting, however, where such information would have the effect of rendering the purchaser liable to judgments which otherwise would not affect him. (*Vide infra*, Vol. 5, p. 64). Judgments are now substantive charges on the estate, and the vendor's attorney will be liable in equity, if he suppress any incumbrance on the property which is known to him. See *Arnot* v. *Briscoe*, 1 Ves. sen. 95: *Evans* v. *Bicknell*, 6 Ves. 193: *Burrowes* v. *Lock*, 10 Ves. 470; 1 Sugd. Vend. 8. 10th ed.: *Richards* v. *Barton*, 1 Esp. 268. But he is not answerable for an error in the abstract occurring without any fraudulent intention on his part, nor is the vendor. Thus it was held, that a purchaser who had resold without examining the abstract by the title deeds, could not recover the expenses of such resale (the title proving defective) from the vendor. "It is urged, that no defect appeared upon the abstract, and that it was only discovered on comparing the abstract with the deeds. Assuming that to be so, (although it is not expressly found), yet, as there was no fraud nor negligence in preparing, the abstract is the only thing that can be imputed to the defendants; and the plaintiff, by exercising ordinary care, might have averted the loss that has arisen from that negligence. It is usual and reasonable, before any expense is incurred, to compare the abstract with the deeds." *Per Parke*, J., *Walker* v. *Moore*, 10 B & Cr. 416. After the Master has come to a determination on the title as shewn by the abstract, it is too late for the purchaser to object that the vendor has not produced the deeds. *Poole* v. *Shergold*, 1 Cox, 160.]

Liability of vendor's attorney for suppressing incumbrances.

Custody of deeds should be stated.

[Mention which of the abstracted deeds are in the vendor's possession, and in whose custody are the others. The importance

of this information is obvious (*infra*, Vol. 5, p. 476), and the purchaser's solicitor, when he examines the abstract with the original deeds, will take care that it is correctly given.]

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[A copy of the contract, and, when the sale was by auction, of the particulars and conditions of sale, should accompany the abstract, including of course, as every properly drawn contract does, a full specification of the lands purchased.]

Contract and particulars of sale to accompany abstract.

Arrangement.]—[As a general rule, the documents should be abstracted in the order of their dates: all extrinsic facts material to the title, (as alterations of names and boundaries of particular parcels, the death of a person without issue, intestacy, &c.), with full particulars of names, additions, places, and other circumstances of identification, and the nature of the evidence by which it is proposed to support them, being noticed as they occur in the order of time. Wills, if they relate to real estate, should be abstracted under the date of the publication, and in the same place any codicils should be stated, and the dates of the testator's death and probate of the will. These last facts should be again stated in the abstract in the order of date. If the subject of the abstract is personal estate, it seems to be most proper to state any will affecting it under the date of the testator's death.]

Chronological order.

Wills.

[Wherever the document is not dated with reference to the Christian æra, the year according to that mode of computation should be given in the margin, under the date in the form in which it appears on the document itself, but within brackets, to shew that it proceeds from the abstractor (*a*).]

Christian æra to be used.

(*a*) [Deeds and other documents were formerly dated from the commencement of the current reign, in reducing which to the year of the Christian æra, it must be remembered, that the maxim, that "the King never dies," is by no means of so great antiquity as is usually represented by our law writers, since it does not appear to have been recognised before the reign of Edward VI., previously to which time the reign of each new sovereign was considered to have commenced, not immediately upon the decease of his predecessor, but either upon the coronation, (as in the case of Henry III., and all the kings who preceded him from the time of the Conquest), or upon the proclamation of the new King, or some other solemn act of sovereignty on his part, or of recognition on the part of the nation. The learned James Tyrrell, in his "Inquiry into the Ancient Constitution of the English Government," observes, with reference to the maxim, that the King never dies:—"Though I grant, ever since the Crown has been claimed by descent, the law has gone as you have cited it; (and that Finche's law lays it down for a maxim, I shall not deny); but, from the beginning or original of kingly government, (whether we look before or after your Conquest), it will appear that the throne was often vacant till such time as the Great Council

Computation by reigns:—"The King never dies."

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[If the subject is an advowson, the presentations may be stated chronologically, in the course of deducing the title to the advowson itself.]

Advowson.

of the kingdom had agreed who should fill it. And to shew you I do not speak without good authority, pray tell me, (if this maxim had then obtained), why, after the death of William I., his eldest son, Robert, Duke of Normandy, did not immediately take upon him the title of King of England, or at least have done it after the death of William Rufus, who you know was placed on the throne, not by right of inheritance, but by his father's testament, confirmed and approved of (according to the ancient English-Saxon custom of succession) by the common consent of the Great Council of the whole kingdom; and yet, notwithstanding, after the death of this William, Henry his younger brother succeeded him by the free election and consent of the same Council, and yet that Duke Robert should never in all his lifetime take upon him the title of King. Pray tell me likewise, (if this maxim had then been known), why Maude the Empress immediately upon the death of her father, King Henry I., did not take, nor yet her husband, the Duke of Anjou in her right, the title of King and Queen of England, though she had had homage paid to her, and fealty sworn to her in the lifetime of her father, as the immediate successor to the Crown; and yet, notwithstanding, the utmost title she could assume was that of *Domina Anglorum*, 'Lady or Mistress, (not Queen) of the English;' whilst Stephen, who had no other title but the election of the Great Council of the nation, held both the Crown and title of King as long as he lived. As also, why Arthur, Duke of Britain, who, according to the now received rules of succession, was the next heir to the Crown upon the death of King Richard I., never took upon him the title of King, unless it were that he very well knew that his uncle, King John, had been placed on the throne by the common consent and election of the Great Council of the Kingdom. So likewise, after the death of King John, why Henry, his son, was not immediately proclaimed King until such time as the Great Council of the clergy, nobility, and people had met and agreed to send back Prince Lewis, whom they had chosen for their King, (though, not being crowned, he never took upon himself that title), and so chose Henry III., (then an infant) for their King. Lastly, why all these princes, viz. Henry II., Richard I., and Henry III., who, according to your notions, were undoubted heirs to the Crown, never took upon them the title of kings of England, nor are so styled by any of our historians, till after their elections and coronations, if it had not then been received for law that it was the election of the people, and coronation subsequent thereunto, that made them kings, and till this was performed, (though they might look upon themselves as ever so lawful successors), the throne was, notwithstanding, esteemed in law vacant." —Bibliotheca Politica, 1718, Dialogue xii, p. 604. See also, Quarterly Review, June, 1826, p. 297; and Sir Harris Nicolas's Chronology of History, p. 283.

Whatever may formerly have been the theory of the succession, it appears to be abundantly proved, that the practice was to date both public and private documents from the time of the actual assumption of the royal dignity by the new sovereign, until the time of Edward the Sixth, which prince having actually assumed the sovereignty on the same day that his father died, (28th January, 1547), and the usurpation by the Lady Jane Grey having rendered it necessary to declare by the stat. 1 Mary, c. 4, that "by and immediately after the death of King Edward the Sixth, the imperial Crown of this realm, &c., did not only de-

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Arrangement where title is divided.

As to mortgages and terms.

[Where, for a certain period, there is a distinct title to each of the several parts of the estate, which afterwards become united in ownership, deduce the title to each part separately, up to the point of junction. By blending the whole under one chronological arrangement much confusion is produced. The resulting divisions of the abstract should be distinguished by separate headings. It has been sometimes recommended, when several mortgages or terms have been created in the same property, to adopt the same principle of division, and trace the title to each mortgage, &c., apart from the other; but this should seldom or never be attempted, because a term or a mortgage is not often assigned or transferred without the concurrence of some of the parties entitled subject to it, the state of whose title must be known before the effect of the conveyance in which he joins can be understood. The strict chronological order of an abstract should not be lightly departed from. Any subordinate arrangement which particular circumstances may render convenient will be best performed by counsel while perusing the abstract in the shape of an analysis of the contents; as to which see 3 Prest. Abst. 191, 202; App. 428; 2 Sugd. Vend. 68, 10th ed.]

Parties.

Parties.]—[It is seldom necessary to transcribe the description of any party, unless to distinguish him from another of the same name, or for the purpose of connecting him with evidence to be given as to his death, intestacy, &c. But notices of the characters in which parties act should always be transcribed verbatim, as the construction of the instrument may be materially influenced by such descriptions, which are in the nature of recitals. If it is thought proper, in order to save the necessity of a distinct statement, to add any description of that kind, it should be shewn, by inserting the words in brackets, that they do not form part of the deed which is being abstracted. It may be as well to mention any relationship that is known to exist between the granting and receiving

scend, remain, and come unto our most dread sovereign lady the Queen's Majesty, but also the same was then immediately and lawfully invested, deemed, and judged in her highness' most royal person by the due course of inheritance, and by the laws and customs of this realm,"—it became the custom to date the commencement of each sovereign's reign from the decease of his predecessor: and in the first year of Elizabeth it was resolved by the Judges, Chief Baron, and Attorney and Solicitor-General, "that the King who is heir or successor may write and begin his reign the same day that his progenitor or predecessor died." Dyer, 165: And. 44.]

[At the end of this article will be found a table of the years of the reigns of the English sovereigns from the Conquest.]

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parties, as such relationship may support a conveyance as a covenant to stand seised, which would otherwise be inoperative.]

Recitals.

Recitals.]—[A recital, which manifestly can have no effect upon the title, and which is not required for the purpose of conveying information, may be entirely passed over; but every recital should be noticed at a greater or less length, wherever there is the slightest doubt as to the propriety of doing so. All recitals of lost documents or of facts which cannot be better authenticated, or of which the recital alone would be sufficient evidence, must be fully stated. Recitals of deeds, &c., which have been previously abstracted, and recitals of facts which have been already introduced as substantive statements in the abstract, should be barely noticed, a reference being made to the page of the abstract in which the information may be found at length. A recital in a purchase deed of the contract for sale, where one of the parties died previously to the execution of the conveyance, is of course important. A distinct recital of the payment of the consideration money, which, as between the vendor and third parties, is equivalent to an indorsed receipt, (see *White* v. *Wakefield*, 7 Sim. 401, *infra*, Vol. 5, p. 26), should be abstracted. Such a recital is *primâ facie* evidence of payment between the parties, although it may, as well as an indorsed receipt, be rebutted in equity: *Coppin* v. *Coppin*, 2 P. Wms. 291: see *Hughes* v. *Kearney*, 1 Sch. & Lef. 132: *Grant* v. *Mills*, 2 Ves. & B. 306: *Ryle* v. *Haggie*, 1 Jac. & W. 231: *Winter* v. *Lord Anson*, 1 Sim. & St. 444; 3 Russ. 488: at law, of course, the recital in a deed is conclusive, *Baker* v. *Dewey*, 3 Dowl. & Ry. 99; 1 B. & Cr. 704: *Harding* v. *Ambler*, 3 Mees. & W. 279; but the indorsed receipt, (not being under seal), is not. *Lambourne* or *Lampon* v. *Corke*, 1 Dowl. & Ry. 211; 5 B. & Ald. 611: and see *Bottrell* v. *Summers*, 2 You. & J. 407.]

Recital of payment for purchase-money.

Recital of parcels.

[A recital may sometimes help out the description of the parcels. Thus, where a lease recited a former lease of premises of "fifty-nine acres, provincial measure," and an intention to demise "the said estate;" and then went on to demise "the same, being forty-five acres statute measure;" the soil of a road which had been set out and made in the interval between the granting of the two leases, and which was included in the first lease, and not excepted from the second, was held to pass. *Doe* d. *White* v. *Osborne*, C. P. Trin. T. 1840; 4 Jurist, 941.]

Testatum.

Testatum.]—[Notice concisely the object or intention of the deed

if any is expressed; the consideration, whether real or nominal; the persons by whom and to whom it is paid, and the acknowledgment of payment, which, as we have seen, is conclusive only at law. State fully any trusts which may be declared of the money paid.]

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Granting words.

[Transcribe the operative, or granting and confirming part, at full length, omitting of course the words of grant, &c., in the past tense, which are only appropriate in a charter referring to a feoffment previously made; and distinguishing, by new lines, the statement of the intention and consideration, &c., from the granting part, and the words which operate at common law from the limitations of the use. State the *habendum*, and the words limiting the use, if any, verbatim; it should never be attempted to give the mere effect of this part of a deed. Sometimes the *habendum* is unskilfully introduced into a deed operating by appointment, and the appointment so worded as to convert limitations, which are intended to operate under the statute, into mere trusts: and occasionally, by a similar slip, the fee is limited "unto and to the use of" the releasee, upon whose seisin uses in favour of other persons are intended to be raised.]

Reference to lease for a year.

[The reference to the bargain and sale for a year should be noticed, and the parties to the bargain and sale should be stated: this is frequently neglected. The loss of the bargain and sale for a year, upon which a recovery deed is founded, is rendered unimportant by the 14 Geo. 2, c. 20, s. 5. *Holmes* v. *Ailsbie*, 1 Madd. 551. The reference to the bargain and sale for a year, in a conveyance of lands in England or Wales by release, is only important as evidence, in case the bargain and sale is lost. In conveyances of lands in Ireland, the recital supplies the place of the bargain and sale itself.]

As to using the present tense in abstracts.

[It would conduce greatly to accuracy, and would facilitate the perusal of abstracts, if the contents of documents were abridged merely, without any attempt being made to convert the present into the past tense; an operation which often gives rise to ambiguity, where it is not performed with considerable care and skill.]

Parcels.

Parcels.]—[Take the description of the parcels at full from the first abstracted document, preserving every word that is characteristic, and omitting only the verbiage. In abstracting the subsequent deeds, this description may be referred to, care being taken to preserve distinctness between statements in the deeds, and observations by the person who prepares the abstract. Therefore, where a deed contains the same parcels as the last abstracted

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deed, but does not describe them by reference, instead of saying "all the premises comprised in the last abstracted deed," which might lead to the inference that they were conveyed by some description as loose as this: say,—"all that, &c.," and note, within brackets, that the parcels are the same as those of the last deed. But every variation in the description of the parcels in the subsequent deeds must be carefully noticed and explained. In this place reference should be made to any collateral sources of evidence which may be resorted to for the purpose of making out the identity of the parcels.]

General words, &c.

[Of the sweeping clause and general words, the only important part is the reference to *reputed* appurtenances, (*infra*, Vol. 4, p. 520), and this is frequently omitted. Exceptions and reservations are, of course, important. The clauses of all the estate, and all deeds, deserve the shortest possible notice.]

Limitations to trustees to preserve remainders.

[Limitations to trustees to preserve contingent remainders are sometimes incorrectly framed in such a manner as, where they occur in a deed, to pass the legal fee; thus protecting the subsequent limitations of the use from the operation of the statute. (See *Venables* v. *Morris*, 7 T. R. 342, 438: *Colmore* v. *Tyndal*, 2 You. & Jerv. 605, as to a deed; and *Doe* d. *Compere* v. *Hicks*, 7 T. R. 433, as to a will). Such limitations should, therefore, be abstracted with sufficient particularity to shew whether or not this has happened.]

As to resulting uses.

[State whether the ultimate use is limited back to the settlor or not; for the effect of such a limitation in cases coming within the operation of the new law of inheritance is to confer a new fee by purchase on the settlor. Stat. 3 & 4 Will. 4, c. 106, s. 3, stated *infra*.]

Trusts and powers.

[Trusts by way of limitation of estate must be abstracted in the same manner as limitations of the use; and powers, if they have been acted upon, or if there is a present intention of exercising them, should be stated verbatim, otherwise they may be shortly referred to, and the fact of their not having been exercised, stated.]

Provisoes for cesser.

[All provisoes for cesser of terms, &c., should be fully set out, as nice questions frequently arise as to whether the term has continuance or not after the satisfaction of the trusts. The same observation applies to powers for changing trustees wherever such powers have been exercised, or are intended to be exercised. Powers of this kind, as has been fully noticed in another place, (*infra*, Vol. 6, p. 507), seldom provide for every possible contingency.]

Covenants.

[Covenants for title may be very concisely stated; but it is im-

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portant to shew with and by whom they are entered into, especially where the production of deeds is covenanted for, in order that it may be ascertained whether they run with the land. And the persons against whose acts the covenants extend, and the incumbrances, if any, which are excepted, must be noticed.]

Execution, &c.

[State the date of the execution of each instrument, and by whom; and if it be an appointment by virtue of a power which prescribes a particular mode of attestation, give an exact copy of the memorandum of attestation.]

Execution by attorney.

[If the deed was executed by an attorney in behalf of any person, state the date and terms of the authority. In a case which recently occurred in practice, a title was rejected, on the ground that the estate in question came to the owner (who was abroad) by descent, *subsequently* to the execution of a general power of attorney, under which his agent assumed to sell. It should also be shewn that the principal was living at the date of the act done by his attorney, (*Watson* v. *King*, 4 Camp. 272), and that the attorney executed in the name of his principal, (*infra*, Vol. 4, p. 256). A power to bind the principal by deed, must itself be under seal. *White* v. *Cuyler*, 6 T. R. 176: *Horsley* v. *Bush*, cit. 7 T. R. 209: *Berkeley* v. *Hardy*, 8 Dowl. & Ry. 102; 6 B. & Cr. 355.]

Witnesses' names should be transcribed.

[It is prudent precaution, suggested by the case of *Bryant* v. *Busk*, 4 Russ. 1, (stated *infra*, p. 99), to transcribe the names and descriptions of the attesting witnesses to all modern deeds.]

Receipts and indorsements.

[All receipts and other memorandums indorsed, and any peculiarity attending them, should be noticed, and any omission in this respect should be supplied by the purchaser's solicitor, when he examines the deeds. In the case of *Kennedy* v. *Green*, 3 Myl. & K. 698, (stated *infra*, Vol. 5, p. 490), the unusual position of the receipt on the back of a deed was, with other circumstances, considered important, as shewing that a purchaser of the title under that deed had not exercised due diligence, which would have led to the discovery of a fraud. Although as between the parties a receipt indorsed is not conclusive, even at law, (*ante*, p. 90), yet the absence of any receipt for the consideration is notice to a purchaser that it has not been paid. And even the existence of a receipt on the back of the conveyance has not, under particular circumstances, been held to excuse subsequent purchasers from making further inquiries. *Vide infra*, Vol. 5, p. 24.]

Stamps.

[J. The stamps that are impressed on the deeds should be noticed, and the purchaser's solicitor should ascertain that they are the proper stamps applicable to such deeds, *at the time*. This may

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be a troublesome task, but should be undertaken, particularly in regard to recent deeds, as no deed can be used for the purposes of evidence, unless properly stamped. It would, therefore, clearly be incumbent on the vendor to procure this to be done.[J.]]

Enrolment, &c.

[The date of livery of seisin, or the place and date of enrolment, registration, &c., if any have taken place, should be mentioned, and the omission of any such formality, in cases in which it is generally required, should be noticed. As to the necessity of enrolment in the lifetime of the acting party, see *Hawkins* v. *Kemp*, 3 East. 410.]

Erasures, &c.

[All erasures and interlineations should be pointed out.]

Acts of Parliament.

Acts of Parliament.]—[A copy of each act of Parliament should, if possible, accompany the abstract; in addition to which, it will be proper to state in the abstract the general effect of the act, and to notice shortly all the clauses by which the title may be affected; as in an inclosure act, the usual clause, that wills, &c. shall not be revoked, but shall have the same operation upon the allotments as they would have had upon the lands subject to the inclosure (*a*). All unusual clauses should be pointed out as well as the omission of any which are usual. The date of the royal assent should always be stated. Before the 33 Geo. 3, c. 13, an act took effect from the first day of the session in which it was passed. *Panter* v. *Att-Gen.*, 6 Br. P. C. 486; *Latless* v. *Holmes*, 4 T. R. 660.]

Wills.

Wills.]—[Invariably transcribe the memorandum of attestation appearing to wills of real estate, including the names and description of the witnesses; because the devisee, whose title is derived through the will, might happen to be one of those witnesses, which would vacate the devise to him. (*Vide* stat. 25 Geo. 2, c. 6, and 7 Will. 4 & 1 Vict. c. 16, s. 15). The attestation to all wills coming under the operation of the recent statute should be transcribed. Unless the will be long, an exact copy of the whole should be furnished; but where the length renders this inconvenient, extract the material parts in the precise words of the testator, which is better than attempting a statement of the effect or substance, the correctness of which often depends upon the right application of very

(*a*) [J. A doubt is sometimes raised, whether this clause applies to the wills of persons who are living at the time of the inclosure, a will being inchoate during the life of the testator. Nothing, however, can be more clear. It could apply to no other will, for it could not be necessary to declare that the will of a *deceased* testator should not be revoked.J.]

difficult rules of construction. A codicil should be abstracted in connexion with the will to which it is annexed; but where anything took place in the interval between the making of the will and the codicil, the latter should be again referred to in the order of its date.] CONTENTS, FORM, AND ARRANGEMENT OF THE ABSTRACT.

Bankruptcy.]—[The proceedings under commissions and fiats of bankruptcy are to be shortly abstracted in the same manner as other documents. The concurrence of the bankrupt in the conveyance will often render strictness as to these particulars unnecessary. The important facts are the dates of the act of bankruptcy, of the commission or fiat, and of the enrolment of the bargain and sale, if any, or of the appointment of assignees. Where there has been a bargain and sale to the assignees, the statement of the anterior proceedings is usually taken from the recitals contained in it. It should be stated whether the bargain and sale has been enrolled.] Bankruptcy.

[The certificate of the appointment of assignees (upon which appointment the bankrupt's estate and effects now vest in them) is not required by the 1 & 2 Will. 4, c. 56, to be enrolled, but must be registered within two months, wherever a conveyance of the bankrupt's property would require registry. (1 & 2 Will. 4, c. 56, s. 27.) But by the 2 & 3 Will. 4, c. 114, s. 8, "No fiat issued or to be issued in lieu of a commission of bankrupt, whether presented in the Court of Bankruptcy or elsewhere, nor any adjudication of bankruptcy, or appointment of assignees, or certificate of conformity under such fiat, shall be received in evidence in any Court of law or equity, unless the same shall have been first entered of record in the Court of Bankruptcy (*a*) as aforesaid." This section applies to a former fiat. See sect. 5. By sect. 9, it is provided, that "upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record, as aforesaid, without any further proof thereof." By the 1 & 2 Will. 4, c. 56, a certificate of appointment of assignees, under the seal of the Court of Bankruptcy, is made evidence of such appointment.] Enrolment of proceedings.

(*a*) [By the 5 & 6 Will. 4, c. 29, s. 25, the Court of Review and sub-division Courts, are declared to have been Courts of record from the time of the passing the statute of 1 & 2 Will. 4. c. 56.]

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Purchasers from assignees entitled to have the proceedings enrolled.

5 Geo. 2, c. 30, s. 41, directing the enrolment of proceedings in bankruptcy for the security of purchasers.

[J. Even before these enactments, a purchaser from the assignees was entitled to have the commission, depositions, and proceedings under it, so far as they were material to the title under the bankruptcy, enrolled. The requisition was often reluctantly submitted to; but the right seems to be clearly admitted in the stat. 5 Geo. 2, c. 30, s. 41, which recites, that "commissions of bankrupts, and the depositions taken before the commissioners of bankrupts, and the proceedings upon such commissions are most commonly kept by such persons as act as clerks or secretaries to such commissioners, and, by reason of the death of such clerks or secretaries, are many times lost and mislaid, by means whereof *such persons as have or may purchase any messuages, lands, tenements, or hereditaments, under any commission,* may be disabled to make out their right and title to the same; and there being no certain place where the creditors of any bankrupt, or any person or persons claiming any estate or interest in any messuages, lands, tenements, or hereditaments, by or under any such commissioners aforesaid, can have recourse to such commission and the proceedings thereupon; and such commissions, depositions, and proceedings, in case they can be produced, are not at present of record nor can be given in evidence, *which may be of very evil consequence to such purchasers,* or persons claiming as aforesaid:" it is then enacted, that, upon the petition of any person or persons praying that the commission, depositions, &c., or any part of such depositions, &c., may be entered of record, the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, shall and may direct and order the commissions, depositions, proceedings, &c., to be entered of record; and in case of the death of the witnesses proving such bankruptcy, or in case the said commissions, depositions, proceedings, or other matters or things, signed and attested as thereinafter is mentioned, should be lost or mislaid, a true copy of the record of such commission, &c., shall and may, upon all occasions, be given in evidence to prove such commissions and the bankruptcy of such person against whom such commission hath been or shall be awarded or other matters, or things.J.]

[J. The act of the 6 Geo. 4, c. 16, s. 96, virtually recognises and confirms this provision, and, moreover, declares that no commission of bankruptcy, adjudication of bankruptcy by the commissioners, or assignment of personal estate, shall be received as evidence, unless the same shall have been so entered of record, as aforesaid.J.]

[This clause is not retrospective, and where the proceedings under a commission issued in 1822 were not enrolled until after the

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passing of the 6 Geo. 4, c. 16, which repealed the 5 Geo. 2, it was held, that they were not admissible in evidence. *Kay* v. *Goodwin*, 4 Moo. & P. 341. See *Tattle* v. *Grimwood*, 11 Moore, 432. But by 2 & 3 Will. 4, c. 114, s. 2, "All commissions of bankruptcy issued before the 1st day of September, 1825, and all depositions, and other proceedings relating to such commissions, directed to be enrolled and actually entered of record upon or since that day, shall be deemed and taken to have been well and effectually entered of record." See the other sections of that act.] [J. The circumstance that the bankrupt will join in the conveyance does not, it is conceived, supersede the necessity of the enrolment, for it does not necessarily follow that the property must belong either to the bankrupt or to the assignees under such commission. The invalidity of the commission might let in the title of third persons. The assignees may, of course, by the terms of the contract, throw the expense of the enrolment, if required, on the purchaser (*a*).J.]

Insolvency. As to the conveyance from the provisional to the permanent assignee.

[J. None of the general insolvent acts prescribed any form for the conveyance of the estates of the insolvent from the provisional to the permanent assignee; but the officers of the Court were in the habit of using the same form which the act directed to be adopted in the conveyance from the insolvent to the provisional assignee. It was, however, objected to such conveyances, that, the statute having simply directed the provisional assignee to convey, the conveyance ought to be made by lease and release, or some other assurance appropriate to his estate, and that the deed of grant or conveyance in question (not being enrolled, preceded by a lease for a year, or accompanied by livery of seisin) was ineffectual for this purpose. The objection was thought to be insuperable; and, accordingly, the statute of 11 Geo. 4 and 1 Will. 4, c. 38, amending some provisions in the Insolvent Debtors' Act, contains an enactment, giving validity to the conveyances antecedently made, and prescribing a form for future adoption.J.] [But it has been since held, that that enactment was superfluous, (*Doe* d. *Broughton* v. *Storey*, 3 Nev. & P. 106), and now, by the 1 & 2 Vict. c. 110, the Court for the relief of insolvent debtors, having made an

Stat. 1 Will. 4, c. 38.

(*a*) [Where the act establishing a canal company directed the company to enrol the conveyances of purchased lands with the clerk of the peace, whereof copies were to be evidence; the court refused to compel the company by mandamus, to enrol the conveyance of certain lands, after a lapse of sixty-five years, during which no application had been made for the purpose. *Reg.* v. *Leeds and Liverpool Canal Company*, 3 Per. & Dav. 174.]

Enrolment under act of Parliament.

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order vesting the insolvent's property in the provisional assignee, is authorised to appoint a permanent assignee or assignees; and when such assignee or assignees shall have signified to the Court their acceptance of the appointment, the estate, effects, and powers of the prisoner, vested in the provisional shall, by virtue of the appointment, vest in the permanent assignee or assignees, without any conveyance or assignment, s. 45.]

Sales by insolvents' assignees.

[The sale by the assignees is directed to be made by auction, but when the assignees had tried to sell by auction, and failed, a sale by private contract, with the consent of the major part in value of the creditors, was supported. *Mather* v. *Priestman*, 9 Sim. 352. See *Doe* d. *Phillips* v. *Evans*, 1 Cr. & Mee. 450 : *Piercy* v. *Roberts*, 1 Myl. & K. 4.]

EVIDENCE NECESSARY TO VERIFY THE ABSTRACT.

3. The evidence necessary to verify the abstract.

Duty of purchaser's solicitor.

[If the abstract of title furnished by the vendor's solicitor be defective in any of the particulars already mentioned, it will devolve upon the purchaser's solicitor, in comparing the abstract with the deeds, to render it complete; and this should generally be done before the title is submitted for the opinion of counsel on behalf of the purchaser. A neglect of this precaution frequently renders a second perusal of the abstract necessary. The propriety, however, of verifying the abstract before the opinion of counsel is taken upon it may depend upon circumstances; for if the abstract is well and fairly drawn in the first instance, it is obviously at least as probable that requisitions of counsel, involving an examination of the original documents, would not have been anticipated by the purchaser's solicitor, as that they would. Sir *E. Sugden* observes, that if the deeds are at a distance or otherwise not easily accessible, and the abstract on the face of it appears to have been skilfully prepared, it may be convenient to defer the examination until after it has been perused by counsel, and when any inquiries may be answered at the same time; but, if recourse may easily be had to the deeds at any time, it will be better to examine them in the first instance.]

[In particular, the solicitor must scrutinise the execution and attestation of deeds and wills, the receipts indorsed, and the stamps; and he should carefully peruse all settlements and wills from beginning to end, in order that no clause that can possibly affect the title may escape. As to the suspicion arising from the non-production of copies of court rolls, see *Whitbread* v. *Jordan*, 2 You. & C. 303, and *infra*, Vol. 5, p. 485. With respect to the liability of

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the purchaser's solicitor for any loss arising from his neglect to render perfect the abstract on which he takes counsel's opinion, see *Ireson* v. *Pearman*, 5 Dowl. & Ry. 687; 3 B & Cr. 799: *Wilson* v. *Tucker*, 3 Stark. 154.]

As to parcels.

[Although it is always the province of counsel to trace the identity of the parcels in the different deeds, yet the purchaser's solicitor should examine into this matter, for which he has often peculiar facilities, with as much care as if the entire responsibility rested on himself; as it is a point in respect of which too much caution cannot be exercised.]

Loss of deeds after abstract delivered, and before conveyance.

[Where the title-deeds were destroyed by fire, after they had been examined by the purchaser's solicitor, but before the title was accepted; it was held, that the vendor could not enforce specific performance, without furnishing the purchaser with the means of proving the contents of the deeds, and that they were duly executed and delivered. Of the former, it was admitted that the abstract, having been verified by the purchaser's solicitor, might be evidence; but to prove the latter, the vendor was held bound to produce the attesting witnesses: and the circumstance, that the purchaser's solicitor had an opportunity of learning the names of the witnesses in the course of his examination of the abstract, was immaterial, for that was not any part of his object or duty. *Bryant* v. *Busk*, 4 Russ. 1.]

Examination of abstract where deeds are at a distance.

[Where the deeds are on or near the locality of the estate, or of the notorious residence of the vendor, it seems that the purchaser must bear the expense of any journey his solicitor may have to take to examine them; and if they are in London, a country solicitor is bound, even as between himself and his own client, to instruct his agent in London to examine the deeds, according to the usage of the profession, and cannot charge for the expenses of his own journey for that purpose. *Alsop* v. *Ld. Oxford*, 1 Myl. & Kee. 564. But where the deeds are in the hands of persons residing in different parts of the country, the purchaser's solicitor is not bound to send the abstract to an agent in a country town, in order that he may compare them with the deeds, but the vendor must be at the expense of his journeys for that purpose. *Hughes* v. *Wynne*, 8 Sim. 85: see *Sharpe* v. *Page*, 2 Sugd. Vend. 82, 10th ed.: *Rawlins* v. *Vincent*, Carth. 124.]

[Where the vendor covenanted to produce a good title, and verify the abstract by the production of all the deeds, &c., at Norwich, at Lynn, or in London, on or before a certain day; it was held, that he was bound to give notice to the purchaser at which place he

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would be ready to produce the deeds, &c. *Rippingall* v. *Lloyd*, 2 Nev. & Man. 410. When the vendor has a covenant for the production of the deeds, he must himself obtain them for the inspection of the purchaser; for if the purchaser went to inspect the deeds, the holder might refuse to produce them to him and would not be liable to an action of covenant for the non-production. *Per Taunton*, J., Id. 419. Although a mortgagee is not generally liable to produce his title-deeds until payment of the debt, (*Postlethwaite* v. *Blythe*, 3 Madd. 242: *Sparks* v. *Montriou*, 1 You. & Col. 107: *Brown* v. *Lockhart*, 10 Sim. 420: and see *Latimer* v. *Neate*, 3 Cl. & Fin. 570, and the observations of the Vice-Chancellor on that case, in *Brown* v. *Lockhart*), yet, if he has consented to a sale before the Master, he has so far taken upon himself the character of a vendor, that he must produce and leave in the Master's office all deeds necessary for the purposes of the sale. *Livesey* v. *Harding*, 1 Beav. 343.]

Mortgagor's liability to produce deeds.

Conditions as to production of deeds.

[Where the vendor stipulated, by his fourth condition of sale that he would "deduce a good title," with certain exceptions there mentioned; and by the sixth condition, that he would "deliver up to the purchaser of the greater part in value of the said estates, all the title deeds and copies of deeds, and other documents in his custody, but should not be found or required to *produce* any original deed, or other documents than those in his possession and set forth in the abstract, or which relate to other property:" it was held, that the vendor was bound to verify his abstract in the usual manner. "It by no means follows," said Lord *Cottenham*, C., "that the vendor cannot prove his title, because he has not in his possession all the deeds necessary for that purpose. It could not, therefore, have been inferred by the purchaser, that the restriction as to the liability to deliver up certain deeds was to apply to the liability to produce them for the purpose of proving the title; and if that inference was not obviously to be drawn from the conditions, will a Court of equity compel a purchaser to take the estate without a title?" *Southby* v. *Hutt*, 2 Myl. & Cr, 215.]

Examination, when to be made.

Expenses, by whom borne where sale goes off.

[The purchaser's solicitor is justified in comparing the deeds with the abstracts and searching for judgments, &c., before he submits the title to counsel, as otherwise much unnecessary expense would be incurred; and if the title turns out to be bad, the seller must pay the expenses of such examination and searches. *Hodges* v. *E. of Litchfield*, 1 Scott, 449. As to what expenses the purchaser cannot recover, where the sale goes off for defect of title see *S. C.*, and *Fleureau* v. *Thornhill*, 2 W. Blackst. 1078: *Ri-*

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chards v. *Barton*, 1 Esp. 268: *Jarmain* v. *Egelstone*, 5 Car. & Pay. 172: *Walker* v. *Moore*, 10 B. & Cr. 416; amongst these are costs *preliminary to the contract*, as, commission for negotiating the purchase, &c.; *Hodges* v. *E. of Litchfield*. If the purchaser has died pending the contract, the expenses incurred in his lifetime are recoverable by his personal representative and not by his heir, the loss having accrued to the personal estate. *Orme* v. *Broughton*, 4 Moo. & Sc. 417. The expenses of investigating the title cannot be recovered, unless a written contract is proved, although money paid by way of deposit, or for the auction duty, may. *Gosbell* v. *Archer*, 4 Nev. & Man. 485; 2 Adol. & El. 500.]

Caution where deeds in possession of third person.

[As to the conclusions that are to be drawn from the non-production of the deeds, and in particular from notice that they are in the possession of third persons, *vide infra*, Vol. 5, pp. 475, 484; and *Farrow* v. *Rees*, at the Rolls, M. T. 1840, 4 Jurist, 1028. Wherever this is the case, inquiries should be made of the holders of the deeds respecting the nature of their interest, care being taken to inform them of the pending contract of purchase. Similar inquiries should be made of tenants and persons in possession, or the counterparts of the leases under which they hold should be inspected, in order to ascertain whether there are any unusual terms by which the purchaser would be bound. *Taylor* v. *Stibbert*, 2 Ves. jun. 440: *Daniels* v. *Davison*, 16 Ves. 249: *Douglas* v. *Whiting*, cit. Id. 254: *Allen* v. *Anthony*, 1 Mer. 282: *Taylor* v. *Baker*, Dan. 71. But a purchaser is not bound to inquire of a person whom he knows to have been lately in possession, but who has quitted previously to the sale. *Miles* v. *Langley*, 1 Russ. & Myl. 39, *infra*, p. 118.]

Inquiries to be made of tenants, &c.

Inquiries where property is vested in trustees.

[If the subject-matter to which the title relates is property vested in trustees, it will be necessary to make inquiries of the trustees, whether any incumbrance on the property has come to their knowledge, as well as to give them notice of the intended dealings with it. According to a recent case, (*Jones* v. *Jones*, 8 Sim. 633, *infra*, Vol. 5, p. 471), there is less occasion for this precaution where the subject is a freehold or chattel interest in realty; but in common honesty, as well as prudence, it should be adopted indifferently in all cases. Priority of notice gives priority of equity; and if the vendor had himself purchased the trust or taken the charge, which is being sold, it will not be an objection to his title, that he omitted to give notice to the trustees, if it appear that no subsequent purchaser or incumbrancer has done so. "The object of notice is to exclude a subsequent purchaser and incumbrancer on the fund; and if it can be shewn that no subsequent party has come in, then the

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fact, that notice has not been given, would not, as it seems to me, be an essential blot on the title. It is, however, necessary that full means should be afforded of most carefully inquiring whether notice has or has not at any time been given to the trustees. Hence it becomes important to know who were the persons filling the character of trustees from time to time. This has not been shewn; neither has the time when the several trustees died been proved, nor who was the survivor. It is said that this proof is not necessary, because an application was made by the purchaser to the party, who was stated by the vendor to be the representative of the last surviving trustee. The application was naturally made to the person pointed out by the vendor; but that by no means renders it unnecessary to ascertain that the representation was really correct. No evidence whatever has been given that *Plant* was the surviving trustee; if he was not, the title, so far as it depends on that matter, is good for nothing." *Per* Lord *Langdale*, M. R. *Hobson* v. *Bell*, 2 Beav. 17. In connexion with the latter part of his Lordship's observations, see some remarks, *infra*, Vol. 5, p. 466.]

What requisitions purchaser's solicitor should make.

[The purchaser's solicitor, in calling for documents or other evidence, must take care that he does not insist on more than he is entitled to; for where a purchaser had called for more than the vendor was bound to furnish, and the vendor, considering that the purchaser would not be satisfied with what he was entitled to, had not afforded the necessary information; specific performance was decreed, on a good title being made out, without costs on either side. *Newall* v. *Smith*, 1 Jac. & W. 263. See *Southby* v. *Hutt*, *ante*, p. 100.]

Covenant for further assurance does not entitle a purchaser to further evidence of

[The purchaser's solicitor must be careful not only to satisfy himself by proper evidence of the facts material to the title, but to procure from the vendor such documents as can be obtained, in order that there may be no difficulty in proving the title on a future sale. For it has been held, that the covenant for further assurance does not entitle a purchaser, who has neglected to obtain evidence of facts material to his title at the time of his purchase, afterwards to call for the production of such evidence, or to have the future preservation and production of the documents containing the evidence secured to him. *Hallett* v. *Middleton*, 1 Russ. 243, 256. So, if the purchaser has omitted to take a covenant for the production of deeds, he cannot, under the covenant for further assurance, require the vendor to enter into such a covenant. See *Fain* v. *Ayres*, 2 Sim. & Stu. 533. But he may, it seems, where he has sold part of the estate, and parted with the original con-

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veyance, obtain a counterpart from his vendor, under the covenant for further assurance. *Napper* v. *Lord Allington*, 1 Eq. Ca. Ab. 166, pl. 4. See another as to the covenant for further assurance, *post*, Vol. 8, p. 296, 1st ed.]

As to supplying defects of title, &c. after the completion of the contract.

[J. But though little encouragement is giving to a purchaser, who goes into a Court of equity after the completion of his purchase, to repair the consequences of his own negligence by seeking to obtain that which he should have required at the time; the case is different where the purchaser's omission has been induced by the fraud, or even the unintentional misrepresentation of the vendor. A signal instance of the former occurred in the case of *Edwards* v. *M'Leary*, G. Coop. 308, (stated *infra*, Vol. 7, p. 361, 2nd ed.); and we have an illustration of the latter in a case before Sir *W. Grant*, where a purchaser filed a bill against the vendors, and an attorney who had the custody of a certain will, through which the purchaser's title was derived, praying that it might be proved in the Ecclesiastical Court, or deposited with one of the Masters for safe custody; and stating, that, at the time of the purchase, the vendors represented that the will had been duly proved, which afterwards was discovered not to be the fact: under these circumstances his Honor decreed, (with the consent of certain legatees, who were interested in the will, and were parties to the suit), that the will should be deposited with the Master; and that the vendors, whose misrepresentation, though probably *unintentional*, had caused the necessity for the suit, should pay all the costs. *Harrison* v. *Coppard*, 2 Cox, 318.J.]

Searches in register office, court rolls, &c.

[The purchaser's solicitor should, of course, search the register office when the lands are in a register county; and, when they are of customary tenure, the court rolls, which form a species of registry. As to the question, whether the court rolls are notice to a purchaser, see *Pearce* v. *Cheslyn*, 3 Madd. 186; 18 Ves. 462: 3 Sugd. Vend. 478, the better opinion seems to be that they are not. In some manors, surrenders of copyholds made out of Court may be presented at any time, and a second incumbrancer, who has searched the rolls, does not gain priority over the first by an earlier inrolment of the surrender to himself, or of his own admittance. He is considered to be acquainted with the custom. *Horlock* v. *Priestley*, 2 Sim. 75; *infra*, Vol. 5, p. 473, n. It may often be advisable to search the rolls of the Common Pleas for assurances inrolled under the provisions of the act for abolishing fines and recoveries, and also the index of the certificates of acknowledgments of married women, under the same act.]

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As to searching for incumbrances.

[J. The duty of searching for incumbrances, of course devolves upon the purchaser's solicitor, he having been apprised by his counsel advising upon the title by what incumbrances the estate is liable to be affected. Complete safety is only to be found in searching for every such incumbrance, though the list of them is somewhat formidable, comprising judgments, Crown debts, accountantships to the Crown, bankruptcy, and insolvency. Sometimes it may be prudent to ascertain the non-existence of all these. Often, however, the rank and situation in life of the parties are such as to render the precaution with respect to some of the points of inquiry superfluous. For instance, no person would think of searching the bankrupt office, where the vendor had never been in trade, or the insolvent office, where he was a person of known opulence and respectability; but, unless in very obvious cases of this kind, the searches should be made; or, if they be omitted at the desire of the purchaser himself, his solicitor should obtain his written authority for dispensing with them. The responsibility often incurred by the neglect of this precaution is very serious; the effect is to transfer the risk from the purchaser himself to the solicitor, though the sole object of the latter in avoiding the search may have been to prevent expense to his client. (See *Brooks* v. *Day*, 2 Dick. 572: *Ireson* v. *Pearman*, 5 Dowl. & Ry. 687). Probably, few persons would be disposed to press their claim under such circumstances; but a prudent man will scarcely be satisfied to rest his security on the existence of an honourable feeling of this kind. A striking illustration of the danger of neglecting to search the office of the Insolvent Debtors' Court occurred within the editor's knowledge. A person purchased a freehold house, which the vendor claimed by devise from his father, and of which he was in possession. The title was apparently well deduced, the conveyance executed, and possession delivered on the payment of the purchase-money, and, on the day following the completion of the purchase, the purchaser received notice from the vendor's assignee, claiming the property under the Insolvent Debtors' Act, of which act the vendor had taken the benefit. Considering the exact point of time at which this claim was set up, and some other circumstances, there was strong reason to suppose that the assignee had designedly placed it in the power of the vendor to commit a fraud: but no distinct evidence of this could be adduced, nor, if proved, would it have enabled the purchaser to retain the property. J.]

Judgments.

[J. In the case of a vendor, who is simply seised in fee, the pur-

chaser's first concern will be to ascertain the non-existence of docketted judgments against him.J.]

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[J. The search for judgments, if pushed to the point at which complete safety is to be attained, would be enormously expensive, for such search ought to extend (*a*) to judgments against all the persons to whom the property has successively devolved for a long series of years (say twenty or thirty), commencing, not from the time at which they severally acquired the estate, but at the remotest period at which judgments might have been entered up against them; for, let it be remembered, that a judgment affects after-acquired property, and is not confined in its operation to the lands of which the debtor was seized at the time. The search, therefore, should be carried back to the birth, or, at all events, to the childhood of such debtor. Perhaps, indeed, where there is no particular reason to suspect the existence of judgments during minority, the search may properly stop at his majority. How much the practice falls short of this rule is obvious. The search is generally confined to the last purchaser, and the persons deriving title from him; it being assumed, that every prior purchaser has performed his duty (*b*) by searching for incumbrances against his vendor, and

To what extent the search for judgments should be carried.

(*a*) [The practice is to search for judgments for ten years, and to carry back the search into a period of ten years from any judgment which from time to time may be found, (3 Prest. Abst. 336), and in this respect it will not be altered by virtue of the statute, 2 Vict. c. 11, before the 1*st of August*, 1841, when judgments already docketted must be registered in the Common Pleas, under the 1 & 2 Vict. c. 110. Of course, there is no occasion to search the *dockets* on a purchase of copyholds, which were not affected by judgments previously to the statute 1 & 2 Vict. c. 110.]

(*b*) [This assumption was formerly more extensively acted upon than it now is, for the practice of dispensing with the investigation of titles was founded on it. In regard to incumbrances, its adoption seems to be matter of necessity; for, if the inquiry as to judgments, Crown debts, annuities, bankruptcy, and insolvency, already sufficiently onerous as applicable to the vendor only, were to be extended to all the anterior successive owners, small properties would cease to be saleable. In this, and many other particulars, a purchaser, previously to the 1st of August, 1841, must be content to rest his security on probabilities. After the lapse of many years, it is not probable that an unsatisfied judgment against a former owner exists, and a judgment creditor would have some difficulty in obtaining information as to the property of which the debtor has from time to time been seised since it was entered up, and of the nature of his estate, &c. And equity would give him no assistance by way of discovery against a purchaser for valuable consideration, without notice. *Snelling* v. *Squib*, 2 Ch. Cas. 47. In *Willaume* v. *Gorges*, 1 Camp. 217, the satisfaction of a judgment thirty-two years old was presumed, there not being sufficient evidence to rebut such presumption. *Vide infra*, Vol. 5, p. 62. Where the present owner has obtained the property by devise or descent, or where, from any other circumstance, it is probable that

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the search rarely goes further back than the time when the person against whom the search is made acquired the property.[J.]]

Fees for searching the dockets.

[The dockets are now under the care of the Masters of the several common law Courts, and the fees for searching, established in pursuance of the stat. 7 Will. 4 & 1 Vict. c. 30, s. 6, are sixpence for one or two terms, and threepence for every additional term, or 2*s.* 6*d.* for a general search where an index is kept. One item of the expense of a long search, is, therefore, considerably diminished.]

Search on sales by assignees of bankrupt.

[J. As judgments were formerly void against bankrupts' estates, whether docketted or not, (6 Geo. 4, c. 16, s. 108), purchasers from assignees had no need to search for judgments against the bankrupt; and it was immaterial that the contract was originally entered into with the bankrupt before his bankruptcy, and the conveyance was taken from the assignees. *Sharpe* v. *Rhoade*, 2 Rose, 192. But, in a case where the bankruptcy intervened between the execution of the conveyance and the payment of the purchase-money, the exemption from judgments against the bankrupt was considered to be not so clear, as that a purchaser could be compelled to take the title. *Sloper* v. *Finch*, 3 Sugd. Vend. 10th ed. 332; 2 Ves. & Bea. 145.J.] [The practice with respect to purchases from assignees must now be modified, in consequence of the enactment of the stat. 1 & 2 Vict. c. 110, s. 13, which gives validity to judgments as equitable charges, notwithstanding the subsequent bankruptcy of the debtor, provided a year intervenes between the entering up of the judgment and the bankruptcy. A purchaser from assignees in bankruptcy, must therefore, in all cases, search the registry at the Common Pleas, commencing at a period of five years next preceding the time of his search, and carrying on the search from that time to the beginning of the year next preceding the bankruptcy. Purchasers from assignees in *insolvency* must make the same search that would be necessary in other cases. *Vide* infra, Vol. 5, p. 44.]

Leaseholds when bound.

[J. With respect to leaseholds, a search for judgments was only necessary for the purpose of ascertaining that no writ of execution was in the hands of the sheriff. By the 29 Car. 2, c. 3, s. 16, the

there was no search made for judgments against the former owner, it seems proper that such search should now be made. If the person against whom the search is made is dead, the search should be carried on for a year beyond the time of his death; within which time judgments against the deceased may be entered, 17 Car. 2, c. 8; 1 Jac. 2, c. 17. See *Baker* v. *Baker*, cited in *Vaughan* v. *Wilson*, 5 Scott, 404: *Blewett* v. *Tregoning*, 4 Adolph. & Ellis, 1002; and *infra*, Vol. 5, p. 52.]

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property of goods is bound only from the time that the *fi. fa.*, or other writ of execution, is delivered to the sheriff to be executed. See *Jeanes* v. *Wilkins*, 1 Ves. sen. 196. In a modern case, the purchaser of leaseholds from an administrator objected to the title on account of the existence of judgments against the intestate, entered up so long ago as 1769 and 1770, alleging the possibility of execution having been taken out; but it appearing that the intestate had parted with the legal estate to a mortgagee in May, 1770, and there being no evidence of the issuing of an execution prior to that time, the objection was overruled. *Causton* v. *Macklew*, 2 Sim, 242: J.] [*Williams* v. *Craddock*, 4 Sim. 313. Now, however, it is not clear that leaseholds are not bound by the *judgment* equally with freeholds; the conclusion drawn, *infra*, Vol. 5, p. 48, from the similarity in language between the 19 Car. 2, c. 3, s. 10, and the 1 & 2 Vict. c. 110, s. 11, is, perhaps, too positively expressed. Until the point is otherwise decided, it will be prudent to make the same search upon a purchase of leaseholds as of freeholds.]

Stat 3 & 4 Vict. c. 82.

[The stat. 3 & 4 Vict. c. 82, after reciting the 14th sect. of the 1 & 2 Vict. c. 110, (which relates to a judgment-debtor's stock in the funds, shares, &c.), enacts:—

Effect of Judge's order in respect of debtor's stock, &c., standing in the name of the Accountant-General.

[Sect. 1. "That the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment-debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares. And whenever any such judgment-debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in to or out of any such stock, funds, annuities, or shares as aforesaid, which now are, or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or in to or out of the dividends, interest, or annual produce thereof, it shall be lawful for such Judge to make any order as to such stock, funds, annuities, or shares, or the interests, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment-debtor: Provided always, that no order of any Judge as to any stock, funds, annuities, or shares, standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the governor and company of the Bank of England, or any

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public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery, or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment-creditor, with the amount of the sum to be mentioned in any such order" (*a*).]

No judgment decree, &c., to affect real estate as against purchasers, mortgagees, and creditors, *with notice*, until memorandum left with senior Master of the Common Pleas.

[Sect. 2. Reciting the provisions of the 19th section of the 1 & 2 Vict. c. 110, respecting the registry of judgments, &c., in the Common Pleas, and that doubts have been entertained, whether a purchaser, mortgagee, or creditor, *having notice* of any such judgment, decree, order, or rule as aforesaid, would not, in equity, be affected thereby, notwithstanding such a memorandum or minute of the same as in the said act is mentioned may not have been left with the senior Master of the said Common Pleas, enacts, "That no such judgment, decree, order, or rule as aforesaid, shall, by virtue of the said act, affect any lands, tenements, or hereditaments, at law or in equity, *as to purchasers, mortgagees, or creditors*, unless and until such a memorandum or minute as in the said act in that behalf mentioned, shall have been left with the senior Master of the said Court of Common Pleas at Westminster, any notice of any such judgment, decree, order, or rule, to any such purchaser mortgagee, or creditor, in anywise notwithstanding" (*b*).]

Effect of notice of unregistered judgment.

[The statute of Westminster 2nd, which gave the elegit, has not been repealed by any of the subsequent acts, and is not mentioned in the statute of 3 & 4 Vict. c. 82, which only protects purchasers, &c., with notice of unregistered judgments, &c, from the effect of such judgments, &c., under the statute of 1 & 2 Vict. c.

(*a*) [It may be observed, that the charge mentioned in the above enactment, will be subject to the doctrine of the cases of *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, &c. (*infra*, Vol. 5, p. 458), respecting notice to trustees; and that therefore a purchaser of an equitable interest in stock, &c., has no occasion to take any precaution against judgments, &c., beyond that of making the usual inquiries of the trustees. But where the stocks, &c., are standing in the name of the vendor himself, the registry in the Common Pleas should be searched, as a measure of precaution. But it is to be remembered, that the provision for registry in the 1 & 2 Vict. c. 110, and that in the 2 & 3 Vict. c. 11, requiring a fresh memorandum to be entered every five years, only contemplate "lands, tenements, and other hereditaments."]

(*b*) [The doubts upon which this enactment arose were sanctioned by the extraordinary decisions upon the construction of the statutes 4 & 5 Will. & M. c. 20; 7 & 8 Will. 3, c. 36, which are referred to, *infra*, Vol. 5. p. 54. The words of the stat. 2 & 3 Vict. c. 11, s. 4, are, however, much stronger than those of the 4 & 5 Will. & M. c. 20.]

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110. So far as this enactment is concerned therefore, the decisions upon the old Docket Acts, that purchasers and mortgagees with notice of undocketted judgments are bound by such judgments under the Statute of Westminster, (*infra*, Vol. 5, pp. 53, 54), remain unaffected. The stat. 1 & 2 Vict. c. 110, does not, it has been seen, (*infra*, Vol. 5, p. 53), interfere with the operation of judgments under the old law. It only remains to see whether there is any thing in the stat. 2 Vict. c. 11, to protect purchasers with notice of undocketted judgments. The first section abolishes the docketting of judgments from the time of the passing of the act, (4th of June, 1839) (*a*). The 2nd section enacts, that no judgment already docketted shall, after the 1st of August, 1841, "affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, and creditors," unless registered under the 1 & 2 Vict. c. 110. This section is worded in the same manner as the 3rd section of the 4 & 5 Will. & M. c. 20, which it has been decided does not protect purchasers and mortgagees with notice, and must have the same construction. It applies, too, exclusively to judgments which *have been docketted*. The fourth section enacts, that all judgments, &c., which have been registered under the 1 & 2 Vict. c. 110, "or which shall hereafter be so registered, shall, *after* the expiration of five years from the date *of the entry* thereof, be *null and void* against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors," unless a fresh memorandum is left within five years before the right of the purchaser, &c., accrued. The words "null and void," in this act, are so much stronger than the words in the old Docket Act, that there is no doubt a Court of equity would, if occasion offered, carry out the intention of the legislature as exhibited by the enactment of the 3 & 4 Vict. c. 82, and hold that the construction of those words was not governed by the cases upon the former act. But, as the clause mentions only judgments, "which have been registered, or which shall hereafter be so registered," there seems to be some difficulty in bringing judgments which have been neither docketted nor registered within its provisions. At the same time, the Courts would struggle against a construction of these acts which should have the inconsistent effect of protecting a purchaser with notice of a judgment which has once been registered, while it leaves him

Notice of unregistered judgment.

(*a*) [The stat. 4 & 5 Will. & M. c. 20, is not repealed, and it deprives judgment debts of priority in the administration of assets, unless they are docketted. It is not easy to see how such priority can now be preserved.]

Priority of judgments in administration.

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unprotected if the judgment of which he has notice has never been registered. This difficulty, it will be seen, if it exists at all, will continue until it is removed by the legislature.]

What search to be made after the 1st of August, 1841.

[After the 1st of August, 1841, it will be unnecessary to search the dockets for judgments, and the search in the registry of the Common Pleas will commence with the 1st of October, 1838, or, after the 1st of October, 1843, with the commencement of the five years next pending the time of the search. This search will disclose all judgments, rules, decrees, orders, and *lites pendentes;* which last are indexed in a separate book. Wherever it is expedient to search for judgments against any other person than the vendor, (and this, on account of the shortness and increased facility of the search, will be done more often than formerly), the search should not be dispensed with on the ground that such person has no interest in the premises within the five years preceding the time of search; for the right of a judgment-creditor may be kept alive for a much larger period. But the search, in no case, need be carried back more than five years.]

Search in respect of equitable interests.

[The search is equally necessary in the case of a purchaser of an equitable as of a legal estate. Previously to the 1 & 2 Vict. c. 110, equitable interests were not bound at law before execution was sued out, (*infra*, Vol. 5, pp. 28, 44), and, until August next, purchasers of such interests will be subject to executions on judgments not registered under that act. A search in the dockets may satisfy him on this head, or, by disclosing the existence of a judgment, put him upon inquiry of the under-sheriff, whether he has a writ of execution on his hands:—an enquiry which the under-sheriff will not generally object to answer. When the purchased interest is merely equitable, and the purchaser can obtain a declaration of trust from the trustee,—or where, in case the legal freehold is bought, he can get in an available term, he may dispense with a search for judgments, although he will still be liable to the danger of executions being sued out before the purchase is completed, And if he intends to rely for protection upon an outstanding legal estate, of course he will take care not to acquire notice by any search.]

Land in counties palatine.

[Where the lands are in either of the counties palatine of Lancaster or Durham, it will be necessary to search in the registry of the Palatine Court, as well as in the registry of the Court of Common Pleas, at Westminster; for the Courts of Westminster have jurisdiction within the counties palatine, (2 Wms. Saund. 194; 11 Geo. 4, & 1 Will, 4, c. 70, s. 139; see 4 & 5 Will. 4, c. 62; and 1 Cr.,

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Mee. & Ros. 597, 848). The Courts Palatine are not named in the stat. 2 & 3 Vict. c. 11, s. 4; although, as that section speaks of "judgments of any of the *superior* Courts," these Courts (which are superior Courts, Bac. Abr. *Courts* (D), 1; Ib. *Courts Palatine*) might be taken to be included in it, but for the terms of the provision that follows, requiring "a like memorandum or minute as was required in the first instance," to be *again* "left *with the senior Master of the said Court of Common Pleas,*" (*i. e.* the Court of Common Pleas at Westminster, sect. 2). The operation of the Docket Acts does not extend beyond the Courts of Westminster, and therefore it should seem that a purchaser of lands within the jurisdiction of a Court Palatine cannot rely on the register provided by the statute 1 & 2 Vict. c. 110; but must now, as formerly, search for judgments in the rolls of that Court, as well as in the registry; and in such search he has not the assistance even of an alphabetical docket under the 4 & 5 Will. & M. c. 20.]

Search for judgments where lands in register county.

[Judgments do not affect lands in the register counties as against purchasers *without notice*, unless registered in the county registry. (See the several acts, and *Hine* v. *Dodd*, 2 Atk. 275 : *Le Neve* v. *Le Neve*, 3 Atk. 646: *Tunstall* v. *Trappes*, 3 Sim. 301: and see *Davis* v. *Earl of Strathmore*, 16 Ves. 427). In Middlesex, judgments bind lands from the time of the entry of the memorial. 7 Anne, c. 20, s. 18. In the North Riding, registry within *twenty* days after the acknowledgment and signing of the judgment, is as good as registry on the very day; (8 Geo. 2, c. 6, s. 33); and in the East and West Ridings, and in Kingston-upon-Hull, the acts allow *thirty* days, (5 & 6 Anne, c. 18, s. 11; 6 Anne, c. 35, s. 28. See, also, stats. 2 & 3 Anne, c. 4, and 8 Geo. 2, c. 6). There is a separate index for judgments in the offices for Yorkshire, but not in that for Middlesex.]

[After the 1st of August, 1841, it will be unnecessary to search for judgments in the local registers; but, before that time, search should be made in the old dockets, as well as in the register at the Common Pleas, where the lands lie in Middlesex, on account of the difficulty of finding judgments in the general register for that county; but where the lands are in Yorkshire, a search in the separate indexes there may be relied on for discovering docketted judgments not registered under the 1 and 2 Vict. c. 110. It is not quite clear whether judgments, &c. within that act would be valid against purchasers of lands in a register county, without being registered in the county register; but it will be prudent in all cases to

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search the register at the Common Pleas; and after the 1st of August next, as has been seen, there will be no occasion to search the separate indexes in Yorkshire.]

As to Crown debts.

[J. Crown debts are next to be considered. Where the purchaser has reason to suspect that the vendor *is*, or that any other person through whom the title is derived, previously to his parting with the estate, *was* a Crown specialty debtor, search should be made in the proper offices for information on the point. Some persons, indeed, adopt the precaution of making the search, in regard to the vendor, as a matter of course; and this practice seems to be warranted by the consideration, that persons often become bound to the Crown in the character of sureties, who are not concerned in the payment or receipt of the public revenue.J.] [The recent enactment of the 2 & 3 Vict. c, 11, s. 8, providing a registry for future liabilities to the Crown, will make no difference for many years to come, in the practice with respect to searches and inquiries, beyond the addition to them of a search in the registry thereby established. *Vide infra*, Vol. 5, pp. 64 b, 64 d, n., 69, 77. The searches usually made are at the Exchequer Office, and amongst the receiver-general's bonds at the Tax Office. But the result is at best extremely unsatisfactory.]

[J. The Crown is not bound by the bankrupt laws; and, therefore, purchasers from assignees are not relieved from the necessity of ascertaining the non-existence of specialty Crown debts; *Attorney-General* v. *Aston*, 2 Mod. 248; Mann. Exch. 2nd ed. 38; and the discharge of an insolvent debtor does not extend to Crown debts, without the consent of three of the commissioners of the treasury under their hands. 1 & 2 Vict. c. 110, s. 103. The Middlesex and Yorkshire Register Acts do not extend to recognisances of the crown.J.]

As to Accountants to the Crown.

[J. Persons holding under the Crown Offices which were in existence at the time of the stat. 13 Eliz. c. 4, are accountants within the meaning of that statute, and are, therefore, incapacitated from making a title to a purchaser, whether any debt is due to the Crown at the time of the conveyance, or not, as the land would be affected by debts subsequently contracted. *King* v. *Bishop of Sarum*, Moore, 126, pl. 274: *Nicholls* v. *How*, 2 Vern. 389.J.]

Bankruptcy.

[J. Bankruptcy, it is well known, disqualifies persons from contracting for the sale of, or conveying, their property. If the vendor, therefore, be in trade, the purchaser's solicitude will properly be

directed to this point. The extent of his risk formerly depended upon the provisions of the act, 6 Geo. 4, c. 16, s. 81, which protected conveyances, contracts, and other dealings and transactions by or with a bankrupt, more than two calendar months before the date and issuing forth of the commission, notwithstanding any prior act of bankruptcy; provided the person dealing with the bankrupt had no notice of such prior act of bankruptcy. If a commission was superseded, and any other commission issued within two calendar months after the *supersedeas*, the transaction, in order to be valid, must have been more than two calendar months before the issuing of the first commission. By sect. 83, the issuing of a commission is to be deemed notice of a prior act of bankruptcy, if the adjudication has been notified in the London Gazette, and the person to be affected may reasonably be presumed to have seen the same. (See s. 85). Sect. 86 provides, that no purchase for valuable consideration shall be impeached by reason of notice of a prior act of bankruptcy, unless a commission shall be sued out within twelve calendar months after the act of bankruptcy.[J.] [The provisions of the stat. 6 Geo. 4, in favour of dealings *without notice*, have by two recent acts been extended to all dealings however shortly preceding the fiat. The stat. 2 & 3 Vict. c. 11, s. 12, enacts, "That all *conveyances* by any bankrupt *bonâ fide* made and executed before the date and issuing of the fiat against such bankrupt, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not, at the time of such conveyance, notice of any prior act of bankruptcy by him committed." Some doubts were entertained whether this enactment extended to the protection of mortgagees, purchasers only being mentioned in the preamble by which it was introduced; but the question has been rendered unimportant, in consequence of the passing, in the same session, of the statute 2 & 3 Vict. c. 29, intituled, "*An Act for the better Protection of Parties dealing with Persons liable to the Bankrupt Law:*" which, after reciting the provisions of 6 Geo. 4, c. 16, s. 82, protecting *payments bonâ fide* made by or on behalf of any bankrupt, to any creditor, or to any bankrupt, before the date of the commission, notwithstanding any prior act of bankruptcy, and the 2 & 3 Vict. c. 11, s. 12, enacts, "That all *contracts*, *dealings*, and *transactions* by and with any bankrupt, really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels, of such bankrupt, *bonâ fide* executed

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Notice of act of bankruptcy.

Stat. 2 & 3 Vict. c. 11, s. 12: conveyances by bankrupt to purchasers without notice.

Stat. 2 & 3 Vict. c. 29. Royal assent, 19th July, 1839.

All contracts, &c., *bonâ fide* made by and with any bankrupt previous to the date and issuing of any fiat to be valid, &c.,

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if no notice had of prior bankruptcy.

or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy, by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney, or cognovit given by any bankrupt by way of such fraudulent preference."]

Retrospective operation of the acts giving protection against secret acts of bankruptcy.

[In the enactment of the 6 Geo. 4, c. 16, s. 82, protecting payments to creditors without notice—the words used are, payments "made or which shall hereafter be made," and it was held upon these words, that the act was clearly retrospective. *Churchill* v. *Crease*, 2 Moore & P. 415: *Terrington* v. *Hargreaves*, 3 Moore & P. 137. The 2 & 3 Vict. c. 29, in reciting the 32nd section of the 6 Geo. 4, c. 16, omits the words "or which shall hereafter be made;" nor are similar words found in the enacting part of the more recent statute. Hence it was supposed, that it had no retrospective operation. In *Edwards* v. *Lawley*, (6 Mees. & Welsb. 285; 8 Dowl. P. C. 234), however, the act was held to apply to an execution levied before it passed—the fiat having issued after the act passed. *Alderson*, B., observed, that "this construction did not give to the act a retrospective operation, for the title of the assignees was incomplete when it passed;" and *Parke*, B., upon the principle of *Gilmore* v. *Shuter*, (2 Lev. 227; 1 Vent. 330; 2 T. Jones, 108), expressed an opinion, that "if the fiat had issued and assignees had been appointed before the act passed, or, perhaps, even if the fiat had not issued, the act could not operate to defeat the right vested in the assignees actually or by relation." In the case of *Luckin* v. *Simpson*, (8 Scott, 676), which was argued previously to the decision in *Edwards* v. *Lawley*, full retrospective operation was attributed to the act. In that case, by orders of Court, an issue had been directed to try the validity of a fiat against *Simpson*, which was disputed by *Luckin*, his execution-creditor. It appeared that the writ of *fi. fa.*, of *Luckin* was put into the hands of the sheriff on the 16th February, 1839, and the fiat was not issued until the 23rd of the same month. But while these orders of the Court were pending, and before the trial

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of the issue, the statute 2 & 3 Vict. c. 29, was passed. The judgment-creditor applied to set aside the rules which had been obtained for the trial of the issue, and that the money produced by the sale of the goods, and paid into court by the assignees, might be paid out to him, which was granted. *Tindal*, C. J., "The whole question between the parties resolves itself into the single point, whether the statute 2 & 3 Vict. c. 29, is prospective only, so as to govern no executions or other transactions, except such as take place after the statute was passed into a law; or whether it is retrospective also, so as to give the law to transactions which have actually taken place before the passing of the statute, whenever they are brought before the Court for adjudication after the statute. And we are of opinion, looking at the words of the statute, that *it gives the law to all cases that come for adjudication before the Court*, where the execution was executed before the fiat in bankruptcy, whether the transaction brought before the Court took place before or after the passing of this statute." This decision was recognised by the Court of Exchequer in the case of *Nelstrop* v. *Scarisbrick*, 6 Mees. & Welsb. 684.]

[J. Who are traders, and what amounts to an act of bankruptcy, may be seen by a reference to the statute, and the treatises on the bankrupt laws.J.] [See also, 1 & 2 Vict. c. 110, s. 8, and *Attwood* v. *Banks*, 2 Beav. 192.]

Conveyance of all the trader's estate when not an act of bankruptcy.

[J. A conveyance of the trader's whole estate will be an act of bankruptcy, unless it conform to the 4th section, stated *post*, Vol. 8, p. 424, 1st ed.; but this or any other acts of bankruptcy would not, according to the 86th section (re-enacted by the 2 & 3 Vict. c. 11, s. 13), affect the dealings of the bankrupt with third persons, after the lapse of twelve months.J.]

Notice of act of bankruptcy and of insolvency.

[J. The fixing of twelve months as the period within which an act of bankruptcy, of which the party has notice, must be followed by a commission, in order to affect him, instead of five years, which was the time under the statute of James, appears to be a material improvement. Another important and salutary alteration made by the act of Geo. 4, is, that it takes away notice of insolvency, as a ground for invalidating dealings with the bankrupt. The indefiniteness of the term "insolvency," (which was first introduced in Sir *Samuel Romilly's* Act), opened a door to much litigation. If the purchaser have notice of an act of bankruptcy within the last twelve months, the danger will extend during the residue of such period; and a Court of equity would not compel a purchaser to accept a title after such notice, even if the vendor offered to swear

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that he owed no debt which would support a commission; *Lowes* v. *Lush*, 14 Ves. 547: *Franklin* v. *Lord Brownlow*, Id. 550; where at least the person with respect to whom the point arises is the vendor himself, who, being interested, is incompetent to prove it; but if the objection occurs in regard to a third person under whom the vendor derives title, and who may therefore be called as a witness to the fact, the argument seems not to apply; though even here, if the trader is a member of a firm, the evidence must negative the existence of demands sufficient to support a commission as well on his separate as the joint estate. *Pott* v. *Turner*, 4 Moo. & Pay. 551.[J.]

Whether the issuing a commission is notice of an act of bankruptcy.

[J. It was clear that a purchaser, without notice, might avail himself of the protection of the legal estate against the effect of an act of bankruptcy prior to his purchase, though a commission issued within the two months. (See *Collett* v. *De Gols*, Cas. temp. Talb. 65.) And some persons have thought that a purchaser, without notice, even after a commission issued, is within the rule; but this is extremely doubtful; for, even independently of the enactment in the statute of Geo. 4, that the issuing of a commission shall be deemed notice of a prior act of bankruptcy, there is strong ground to contend that the issuing of a commission or fiat is an act of such notoriety. as to deprive a purchaser of every pretext for the plea of want of notice. (See Cas. temp. Talb. 70.) That act, however, declares, in general terms, that issuing a commission shall be deemed notice of a prior act of bankruptcy; and though it might seem that this enactment had more immediate relation to the two immediately preceding sections, by which validity is given to transactions of the bankrupt two calendar months before the issuing of the commission, notwithstanding a prior act of bankruptcy, *of which the party had no notice;* yet such a construction would produce this palpable incongruity, that the transactions are to take place before the issuing of a commission, and the issuing of the commission is to be notice in such transactions. But by no construction can this anomaly be avoided in regard to the stat. 46 Geo. 3, c. 135; because the enactment in terms was, that the issuing of the commission should be notice *for all the purposes of the act*, and the only purposes in which notice is referred to, expressly relate and are confined to transactions *before* the commission. It is remarkable that this error has escaped observation.[J.]

Sales of property acquired after bankruptcy.

[J. If a fiat in bankruptcy be, as it has been suggested, notice of a prior act of bankruptcy, it would be contrary to the established principles of equity to allow a subsequent purchaser to derive any

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advantage from getting in a legal estate, against the equitable claim of the assignees. Where the vendor, having been bankrupt, has obtained his certificate, the material point to be ascertained is, that the certificate was prior to his acquisition of the property; and also, if it be his second bankruptcy, or the bankrupt has previously been discharged by an insolvent act, that his estate has paid 15*s.* in the pound; for if not, then, by the 127th section of the act of Geo. 4, his future estate and effects, notwithstanding his certificate, will vest in the assignees, who are authorised to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the fiat. This enactment goes farther than the statute 5 Geo. 2, c. 30, s. 9, which simply declared, that the estate should remain liable to the creditors; and this was held not to prevent the bankrupt from making a title to after-acquired property. The present act, of course, admits of no such construction, as the property vests absolutely in the assignees.[J.]

Bankruptcy.

[Under the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 37, all the property, real and personal, acquired by the insolvent before his final discharge, or his full discharge from custody without any adjudication being made by the Insolvent Debtors' Court, passes under the vesting order to the provisional assignee, and the appointment of the permanent assignees transfers to them whatever was vested in the provisional assignee, (s. 45); and also authorises them to execute powers which the insolvent might have executed for his own benefit, (s. 49). *Hepper* v. *Marshall,* 9 J. B. Moore, 710: *Woodland* v. *Fuller,* Q. B., E. T. 1840; 4 Jurist, 742.]

As to insolvent debtors.

[By the 87th section of the act it is provided, that before adjudication, the prisoner shall be required to execute a warrant of attorney, authorising the entering up judgment in one of the Courts at Westminster, in the name of the assignee, for the amount of his debts; and the order of the Court for entering up such judgment is declared to be a sufficient authority to the proper officer for entering up the same, *and such judgment is to have the force of a recognisance.* And when it appears to the satisfaction of the Court that the prisoner is of ability to pay his debts or any part thereof, or is dead, leaving assets, the Court is to permit execution to be taken out. By sect. 92, where the debts are satisfied, the Court may order the warrant of attorney to be cancelled, satisfaction entered up, and any of the insolvent's property remaining in the power of the assignees to be re-assigned.]

[J. In addition to the preceding objects of inquiry, some practition-

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As to searching for annuities.

ers extend their searches to memorialised annuities; and this, in particular cases, may be a proper precaution, the granting of redeemable annuities being a mode of raising money usually resorted to by those whose estates are too much incumbered to admit of their obtaining it at the legal rate of interest. But, in ordinary cases, the search can scarcely be recommended; since the memorial conveys no information as to the particular lands charged; nor does it necessarily state whether any lands are charged or not; (*vide infra*, Vol. 5, p. 462); and therefore confers no priority upon the annuitant relatively to any other incumbrancer. The search, however, often serves as a useful index in regulating the search for judgments, since redeemable annuities are generally secured by a judgment entered up by virtue of a warrant of attorney.[J.]

Arrear of annuities should be shewn to be paid.

[J. It is not enough to prove that an annuity affecting the property is expired; evidence should be adduced of its having been duly paid up to the time of its expiration. The case of *Wynne* v. *Williams*, 5 Ves. 130, strongly shews the necessity of attention to this point. A testator devised his estates to A., charged with an annuity of £100 to his (the testator's) wife. A. mortgaged the lands several times, and the widow joined in the mortgages for the purpose of postponing her annuity. A. afterwards sold the equity of redemption, and the purchaser took an assignment of the mortgages, but the widow did not join in the purchaser's conveyance. She died in 1781, and the present bill was filed in 1796, by her representatives, against the purchaser, to recover the arrears of the annuity *from the death of the testator in* 1769, to that of the annuitant in 1781, and Sir *R. P. Arden*, M. R., decreed in favour of the plaintiff, on the ground that the length of time did not warrant him in presuming satisfaction. The effect of this decree, therefore, was to oblige a purchaser to pay twelve years' arrear of an annuity which had ceased fifteen years before the filing of the bill. Here the annuitant was living at the time of the purchase; but had she then been dead, *i. e.* had the sale taken place between 1781 and 1796, the result would have been the same.J.] [*Vide ante*, p. 23.]

Purchaser should inquire into the terms of existing leases or tenancies of which he has notice.

[J. Notice to a purchaser of the existence of a lease or tenancy is notice of the contents of such lease, or the terms of such tenancy. Thus, if it were stated, that the premises were in lease for a certain term, and the purchaser made no farther inquiry, and it afterwards turned out that the lessee had a covenant for renewal, the purchaser would be bound by that covenant. See 16 Ves. 254, and *infra*, Vol. 4, p. 298.J.]

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Inquiries to be made of tenants.

[J. And the rule has even been carried to this extent, that where notice was proved against a purchaser, of the fact of the lands being in the occupation of a tenant, and he made no farther inquiry, and it turned out, that the lessee had himself a contract for the purchase of the estate, the purchaser was held to be affected with notice of, and therefore to be bound by, that contract. *Daniels* v. *Davison*, 16 Ves. 249. This is a very important doctrine, and should put purchasers on their guard. The contract in *Daniels* v. *Davison* was subsequent to, and quite distinct from, the instrument by which the tenant became lessee. The principle would, of course, apply to those cases in which the lease contains a clause of preemption, *Taylor* v. *Stibbert*, 2 Ves. jun. 437: *Hall* v. *Smith*, 14 Ves. 426; and see 16 Ves. 254: and, therefore, where lands are described in particulars, or a contract for sale, as being held by lease, the purchaser should not be satisfied without seeing a copy of the lease; and where the statement simply is, that there is a tenant, the purchaser should ascertain the nature of his interest, and the terms under which he holds; for by those terms he will be bound.J.] *Ante*, p. 101.

As to property being sold subject to an apportioned part of a larger rent.

[It often occurs that leasehold property is sold subject to an apportioned part of a larger rent. In such cases the vendor must prove that a valid apportionment has been effected, (as to which *vide infra*, Vol. 4, p. 334). In *Barnwell* v. *Harris*, 1 Taunt. 430, it appeared, that the messuage in question, with other houses, was built upon land demised in 1764, at £28 rent, and that the owner of the rent had, for more than twenty years, accepted £2 a-year rent for these premises. The purchaser brought an action for his deposit on an objection to the title, founded on the liability of the premises to the larger rent. *Mansfield*, C. J., left it to the jury to consider, whether the rent had been apportioned by the act of the landlord; and they found for the plaintiff. The Court refused to disturb the verdict, being of opinion that the vendor was bound to adduce evidence of the apportionment, and could not oblige the purchaser to rely upon an apportionment being presumed from the payment for twenty years of the smaller rent; for, admitting such presumption to be clear in the absence of all evidence, it might be rebutted by contrary evidence.]

Inquiry to be made as to dower.

[Wherever a person, under whom the vendor derives his title, appears by the abstract to have been solely seised of the inheritance in possession, inquiry will of course be made as to the fact of his having been married at the time, and previously to the year 1834. Perhaps proof of the negative of this cannot be required; and the

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purchaser ought, in order to entitle him to any evidence of the exemption of the estate from dower, to shew that the owner of the estate was married during his seisin, or at least to raise a presumption of the fact, by shewing that he had a wife at some anterior or subsequent period.]

[When the fact to be ascertained is, whether a deceased person left a widow, his will should be looked into to see if mention is made of a wife: or, if he died intestate, it should be inquired to whom administration was granted. Sometimes the parochial register of burial states whether the deceased was a bachelor. When a widow is proved to have been entitled to her dower, and is dead, it may still be prudent, in recent cases, to ascertain that there are no arrears of dower due. See *Wynne* v. *Williams, ante,* p. 118.]

As to restraining purchaser from requiring evidence of facts anterior to a given period.

[J. A point deserving consideration in framing conditions of sale, is, whether the purchaser should not be restrained from calling for evidence of extrinsic facts, as heirship, intestacy, death, &c., which are recited or taken notice of in deeds of a certain antiquity. The strict rule, it is conceived, is that the purchaser is entitled to require evidence of all facts material to the title, whether stated in deeds or not, occurring during the period for which an adverse claim might be sustained, *i. e.* for sixty years. Such a rule, it is obvious, must often involve the vendor in great difficulties. A case has occurred, within the observation of the editor, in which a considerable part of the purchase-money was absorbed by the expenses of collecting evidence of the heirship of certain persons who conveyed as co-heiresses of the last owner, in 1780; so large was the body of evidence requisite in order to establish the relationship between the parties and the deceased. To prove a person standing in the relationship of second cousin to be heir, no fewer than six marriages, six baptisms, and two deaths, at the least, must be proved, besides the failure of the lineal descendants of the ancestor, and non-existence or extinction of any elder collateral branches of the issue of the several persons through whom, either in the ascending or descending lines, the pedigree is to be traced.J.]

[J. If the property has become distributed among numerous coparceners, (which happened in the case just alluded to), the amount of evidence may be greatly augmented, and the want of any one link in the pedigree is a fatal defect. It is not surprising, therefore, that vendors should be anxious to negative the purchaser's claim to evidence, the procuring of which is attended with so much expense and difficulty. If the title has been investigated before the

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sale, the period of negation should be adapted to the circumstances of the title; if no such investigation has taken place, thirty years are generally fixed as the lapse of time, after which proof of a fact is to be dispensed with, probably by a kind of analogy to the rule, (with which, however, it has no necessary connection), that a deed or will thirty years old proves itself; so as not to require that evidence should be given of its execution. *Doe* d. *Oldnall* v. *Deakin*, 2 Man. & Ryl. 195. It is sometimes supposed that recitals in an instrument of this age possess a degree of weight as evidence, which does not belong to statements in those of a more recent date; but this is clearly a mistake. Recitals are never evidence as against persons who are not parties to the deed (*a*), though where they are supported by long uninterrupted possession, and relate to facts which must have been within the knowledge of the parties, especially if those facts are stated with the circumstances of time, place, &c., they may often safely be relied on.[J.] [See *Neale* v. *Wilday*, 2 Str. 1151: *Banbury Peerage Case*, 6, 117: *Devon Peerage Case*, by Nicolas, App. 44, 46; *Eccleston* v. *Petty*, Carth. 79; 2 Peake, 204.] [J. No general rule, however, upon the subject can be laid down. A sound discretion must be exercised in each particular case. The doctrine was discussed in the case of *Fort* v. *Clarke*, 1 Russ. 601, which was as follows:—

As to recitals being evidence.

Fort v. *Clarke*: Recitals in a deed of 1793, not sufficient evidence of pedigree.

[J. A. by his will, dated in 1732, devised his estate at S., after the decease of his wife, and subject to the payment of two sums of £110, which the trustees were empowered to raise out of it, to his second son, John Cormick, for life; remainder to the first and other sons of John in tail male; remainder to the daughter of John in tail general; remainder to his own right heirs. A. died not long afterwards, and his widow died in 1747. Default having been made in the payment of £200 charged upon the lands, the trustee, in pursuance of directions contained in the will, entered into the receipt of the profits; and, in 1750, he raised what remained unsatisfied of the £200, by mortgaging the lands for a term for a sum under £100. There was no evidence that, from that time till 1793, any of the persons who should have been entitled under

(*a*) [See *Doe* d. *Rogers* v. *Rogers*, 3 Adol. & El. 513. Recitals under seal are conclusive at law against the parties to the deed, and those having privity of estate claiming under them, and in actions between themselves may generally be relied on as estoppels, although not so pleaded. *Doe* d. *Pritchard* v. *Dodd*, 2 Nev. & Man. 45: *Doe* d. *Brame* v. *Maple*, 5 Scott, 35. But a stranger cannot take advantage of an estoppel, unless he pleads it. *Bowman* v. *Rostran*, 2 Adol. & Ell. 283. *Vide infra*, Vol. 4, p. 123 *et seq.* As to the use of recitals in matters of pedigree, see further, *post.*]

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Recitals: *Fort* v. *Clarke.*

the will, dealt with or exercised any right over the property. In 1793, the property was described as belonging to certain persons of the names of Wetter and Gibbons, resident in Bermuda, who claimed as heirs of the bodies of two daughters of John Cormick, and in the same year they, by deeds of lease and release, reciting the devolution of title to them under the will, in consequence of the death of the son of John Cormick without issue, and by a fine and common recovery, conveyed the premises to Brickwood in fee. The mortgage term was then outstanding; and Brickwood afterwards obtained an assignment of it from the personal representatives of the mortgagee. From 1793, the possession had remained unchanged and undisturbed in Brickwood, and those claiming under him.[J.]]

[[J.] On a reference of title in a suit for specific performance, instituted by the vendor, evidence was adduced to show that Wetter and the Gibbonses were the heirs of the body of the two daughters of John Cormick the son, and that all his other children died without issue. That evidence consisted principally of affidavits concerning the state of the family, made at Bermuda, in 1766, and afterwards in 1785, with a view to measures which were in contemplation at those two periods, for the recovery of the property. The affidavits, however, and the documents which were offered in addition to them, were altogether unsatisfactory. The vendor then placed his title on this ground, that under the circumstances of the case, he was not bound to establish, by extrinsic testimony, the truth of recitals of the deeds in 1793, which set forth the pedigree of Wetter and of the Gibbonses, and purported to trace the devolution of title to them under the original will. The Master having certified against the title, the question came before the Court on exceptions to the report.

[[J.] Lord *Gifford*, M. R.—"It has been contended that the recitals in the deed of 1793 ought to be received as sufficient evidence of the pedigree of the parties who then conveyed to Brickwood. These recitals, whatever effect they may have against the parties to the deeds, cannot, as against third persons, be any evidence of the pedigree. If evidence had been given that possession had followed and accompanied the pedigree; if between 1747 and 1793, a possession had been shewn passing from parent to child under the entail created in 1732; that enjoyment would have been a strong circumstance to prove that the persons named in the pedigree did, in fact, fill the characters which it was, in 1793, alleged that they did fill. In 1766, affidavits were made with a view to enforce the claim of

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the daughters through whom the plaintiff derives title; and in 1785, fresh affidavits with respect to the state of the family were made for the same purpose. On neither occasion, however, was the claim enforced, and there is not the slightest proof of any possession, from 1747 to 1793, in those through whom the title is not traced; it does not even appear that the possession was ultimately obtained. With nothing but the recitals of the deeds executed in 1793, the conveyance to Brickwood, and the subsequent enjoyment under the conveyance, with no proof of the pedigree on which the title depends, or of possession from 1747 to 1793, according to that pedigree, I cannot say that the Master has drawn a wrong conclusion, and that this is a title which a purchaser can be compelled to accept."[J.]

Recitals.

Neesom v. *Clarkson*, 2 Hare, 163.

[In the subsequent case of *Slaney* v. *Wade*, 1 Myl. & Cr. 338, at the trial of an issue directed by the Court of Chancery, to prove the legitimacy of Robert Moreton, a deed was offered in evidence, which was made in 1798, between Mary Stanton and the said Robert Moreton, by which Mary Stanton, as representative of a surviving trustee, assigned certain trust property to R. Moreton; the deed containing a recital that R. Moreton was entitled to the property as the only child of the marriage of Elizabeth Brandwood and Henry Moreton. It became unnecessary to rely on this evidence; the fact in question being made out *aliunde*; but Lord *Cottenham*, C., said:—"I have considered this evidence without reference to Mary Stanton's deed; because, although it may be that this deed could not have been rejected, inasmuch as it goes to prove the fact of property having been enjoyed by the lunatic, [R. Moreton], as the legitimate son of Elizabeth Brandwood, yet I do not think that it can be used for any purpose beyond this, and therefore, not for the purpose of using any recitals in it as evidence of the plaintiff's pedigree."]

Slaney v. *Wade*.

[Recitals or descriptions contained in wills, even although annulled, are evidence of the same kind as recitals in deeds. *Doe* d. *Johnson* v. *Earl of Pembroke*, 11 East. 504: *Lisle Peerage*, by Nicolas, 53. A statement in a will of the place and time of birth of the testator's child, was held good *primâ facie* evidence of her age. *Vulliamy* v. *Huskisson*, 3 You. & C. 80. But when the evidence relates to real estate, the probate of a will is not admissible, even for this purpose. If the original cannot be obtained, then the ledger book of the Ecclesiastical Court may be resorted to. See some remarks *post*, on the proof of wills.]

Recital in wills.

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[Previously to considering the evidence which may be resorted to in making out a pedigree, it will be convenient to state concisely the rules of inheritance, both those which are now in force, and those which affected descents happening before the year 1834.]

Fundamental rule of descent.

1. *As to Descents happening and Limitations made before the Year* 1834.]—[The fundamental rule of descent, as it existed in its greatest simplicity during the feudal ages—or rather, as the feudal doctrine, if correctly interpreted, would have indicated it, is, that the estate descends to the issue of the original purchaser—to the males and their issue male and female, in preference to the females and their issue—to the elder male and his issue, in preference to the younger male and his issue; and if there are no sons or issue of sons, to the daughters and their issue *per stirpes*, in equal shares; the descent among the issue of each daughter being regulated in the same manner as the descent among the issue of males.]

Origin of the rule *seisina facit stipitem.*

[Feuds, in the first stage of their change from mere life estates to estates of inheritance, reverted, upon the death of each vassal, to the lord, who, upon receiving a fine or *relief*, made a new grant by investiture to the successor or heir, (Sullivan's 11th lecture); and no title by descent was complete until this had been done. Hence arose the maxim of later times, that "*seisina facit stipitem*," in other words, that the descent should be traced from the last person who actually obtained seisin of the land. 2 Blackst. Com. 209.]

Seisin not necessary in first purchaser.

[It follows, that this requisition of actual seisin could not apply to the purchaser, from whom the estate was descendible, whether he acquired actual seisin or not. *Weale* v. *Lower*, Pollexf. 54: *Goodright* v. *Serle*, 2 Wils. 29. In *King* v. *Withers*, Cas. temp. Talb. 117, 123, *Talbot*, C., speaking of a contingent estate, said:—"It does not indeed absolutely vest, because the contingency may never arise; but it is carrying it too far to say that it does not vest at all. Why may it not vest in such a manner as to be transmissible? A condition may descend upon the heir, although no estate does actually descend from the ancestor, and when the condition is performed, he shall be in by descent, because of the condition descending." See *Geary* v. *Bearcroft*, Cart. 57: *Hulme* v. *Heylock*, Cr. Car. 200: *Chauncy* v. *Graydon*, 2 Atk. 618: *Jones* v. *Roe* d. *Perry*, 3 T. R. 88. Thus, the estate of a devisee or surrenderee of copyholds is transmissible before admittance, *Vaughan* d. *Atkins* v. *Atkins*, 5 Burr.

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2786; Watk. Desc. 20. A distinction is sometimes taken respecting remainders contingent as to the person, that they are not descendible until the contingency is determined; (Fea. Cont. Rem. 371, 561; Watk. Descents, 4); which only means, that you cannot trace a descent until you know from whom it is to be traced.]

Old law of inheritance.

[The seisin of an heir before he acquires an actual seisin, is called a seisin in law, and as has been said, was not sufficient to make him the stock of descent. Actual seisin, or seisin in deed, may be had upon a descent by entry with intent to acquire seisin, Co. Litt. 245. b., 368. a.; and see *Doe* d. *Griffith* v. *Pritchard*, 5 B. & Ad. 765: *S. C.* nom. *Doe* d. *Evans* v. *Pritchard*, 2 Nev. & Man. 489: *Doe* d. *Jones* v. *Williams*, Id. 602; 5 B. & Ad. 783. A recovery does not change the seisin until execution served. *Shelley's case*, Moore, 141; Co. Litt. 266. b.; Plowd. 43, b. The continued possession of the ancestor's tenant for years, by elegit, or by statute, amounted to an actual seisin on the part of the heir, without any entry or receipt of rent by him. Gilb. Ten. 34; Co. Litt. 15. a., 243. a.; Com. Dig., *Seisin*, (A. 2.) and (C.); 3 Rep. 42; 9 Id. 105, b.: *Goodtitle* d. *Newman* v. *Newman*, 3 Wils. 506: *Bushby* v. *Dixon*, 3 B. & Cr. 298: 5 Dow. & Ry. 126. And the entry, or possession, or receipt of the profits of the land by the guardian or lord of an infant heir, or by a stranger, (who is considered to enter as guardian), was looked upon as equivalent to entry by the infant himself. *Podger's case*, 9 Rep. 106 a.; Co. Lit. 15 a, 89; Com. Dig. *Assize* (B. 4): *Goodtitle* d. *Newman* v. *Newman*, 3 Wils. 528; 2 W. Bl. 938: *Bennet* v. *Whitehead*, 2 P. W. 645: *Morgan* v. *Morgan*, 1 Atk. 489: *Dormer* v. *Fortescue*, 3 Id. 130: *Doe* d. *Barnett* v. *Keen*, 7 T. R. 386. See *Rex* v. *Sutton*, 5 Nev. & Man. 353. And the entry of one coparcener, tenant in common, was generally the entry of all. *Small* v. *Dale*, Hob. 120; Moo. 860; Co. Litt. 253. b: *Fairclaim* d. *Empson* v. *Shackleton*, 5 Burr. 2607: *Doe* d. *Thorn* v. *Phillips*, 3 B. & Ad. 753: *Doe* d. *Reed* v. *Taylor*, 5 Id. 575. See *Devonport* v. *Tyrrel*, 1 W. Black 675: *Leigh* v. *Shepherd*, 5 J. B. Moore, 297. And equitable interests were transmissible by analogy to the rule at law. *Hinton* v. *Hinton*, 2 Ves. sen. 638. "The possession of a trust is by bill;" *Penvill* v. *Luscomb*, Mosel. 72; 2 Jac. & W. 201. A *possessio fratris*, (*i. e.* a seisin to turn the descent away from the brother of the half blood to the sister of the whole blood), was not favoured. See Co. Litt. 281. a.; 3 Wils. 520: *Cowper* v. *Cowper*, 2 P. Wms. 736: *De Grey* v. *Richardson*, 3 Atk. 471; and further, Com. Dig. *Seisin*.

What amounts to a seisin.

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Old law of inheritance. Seisin through dowress.

[The husband's seisin in law was sufficient to entitle his widow to dower; and a posthumous seisin in fact might thus have been acquired as to one-third of the land, by the endowment of the widow of the deceased heir; and such entry by the widow would, by relation, defeat any seisin acquired in the meantime by the heir of her husband's ancestor, but not as to the remaining two-thirds. Litt. s. 393; Co. Litt. 15. a, 31. a, 240. b. And the entry of the husband as tenant by the curtesy of a deceased heiress, would, in like manner, establish her seisin, and defeat any obtained by the next heir. See Watk. Desc. Ch. 1, sec. 3.]

Seisin of a reversion.

[Until a reversion or remainder actually falls into possession, there cannot, properly speaking, be any seisin of it beyond that which is said to be had through the possession of the particular tenant, and therefore the heir of the person to whom the remainder was originally limited, was generally entitled. *Goodright* v. *Serle*, 2 Wils. 29: *Ratcliffe's case*, 3 Rep. 42 a.: *Kellow* v. *Rowden*, Carth. 126; 1 Show. 244: *Cunningham* v. *Moody*, 1 Ves. sen. 174. But the heir of the original remainder or reversion might, by certain acts of ownership, acquire such a constructive seisin as was sufficient to turn the descent. This happened if he granted his reversion or remainder over for life or in tail, or absolutely in fee, taking it back again by way of use. Co. Litt. 15. a, 191. b, 8. Rep. 35 b; *Stringer* v. *New*, 9 Mod. 363. But where a lease for life was made, reserving rent, the receipt of such rent by the heir did not according to the greater number of the authorities amount to a seisin of the reversion. 7 T. R. 390; Harg. Co. Litt. 15. a, n. 5; Id. 23. a, 83; 3 Rep. 42; 8 Id. 213.]

Other incorporeal hereditaments.

[With respect to other incorporeal hereditaments also, as rents, advowsons, &c., the only way of acquiring a seisin was by exercising acts of ownership, as, by receiving the rent, presenting to the living, &c. Com. Dig. *Seisin*, (C).]

Descent among collaterals.

[On failure of lineal descendants of the person last seised, his collateral kinspeople of the whole blood, being of the blood of the first purchaser, (*Hawkins* v. *Shewen*, 1 Sim. & St. 257), inherited to him, proximity of relationship, however, being disregarded for the purpose of giving preference to the male stock as far as it would extend, so that the descendants of a paternal grandmother were postponed to the descendants of a paternal grandfather's mother. 2 Bla. Com. 238; Watk. Deac. Ch. 3, s. 3: *Davies* v. *Lowndes*, 7 Scott, 22, 56.]

Illustration of the old rules of descent.

[To illustrate the application of the rules above-mentioned; suppose P., the original purchaser, to have died leaving two sons, S. and s., and two daughters, D. and d.; S., the eldest, took the

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entire estate. If S. had died in P.'s lifetime, leaving two sons, S'. and s'., and two daughters, D'. and d'., S'., the eldest, inherited. If S'. was also dead, his issue inherited; and if he left no issue, s'. was the heir. If s'. was dead without issue, D'. and d'. took in equal shares; and if D'. was dead, leaving a son, that son took her share; and if she had left no son, but three daughters, each daughter took an equal portion of her mother's share, that is, one-sixth of the whole, d'. taking the remaining half.]

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[If S. inherited the estate from P., acquired seisin, and died leaving no issue, the person who would have been next heir to P. in case S. had died in P.'s lifetime, would have inherited, subject to the restriction presently to be mentioned. This heir is s. and his issue, or in default, D. and d. equally, so that if D. had previously died, leaving an eldest son, and d. had previously died, leaving two daughters, such son would have taken one-half, and each daughter a fourth. In all of these cases the taker was said to be the heir of the person last seised, and to inherit directly from him. For a reason which will be presently explained, no one could inherit in this way from a relation, unless he derived his relationship from both parents, that is, unless he was a relation of the whole blood; therefore, a son of P. by another wife than the mother of S. could not inherit from S. by reason of his relationship on the father's side: and, if P. had left daughters by the mother of S., and a son by a second wife—although, had S. died after P. without having acquired seisin, his half brother would have taken as heir, not to S., but to P.,—yet if S. had acquired seisin, and thus made himself the stock of descent, his sisters would have inherited in preference to his half brother. Hence the maxim, "*Possessio fratris facit sororem esse hæredem.*"]

Exclusion of the half blood.

Possessio fratris.

[If S'. inherited, acquired seisin, and died without issue, the person inherited who would have been next heir to S., (being also of the whole blood of S'.), that is s'. or his issue. In the same way, if there were no lineal heirs of S., the next heir of P. of the whole blood (s'.), and his issue was taken; in other words, the next *collateral* heir of S.]

[Had S'. died *without* having acquired seisin, the next heir of S. would have taken, that is, the issue of S'., if he left any, and if not, the next eldest son of S., whether of the whole blood to S'. or not, and his issue.]

[On failure of all the issue of P., the estate, by the strict feudal rule, escheated to the donor, having been granted only to P. and his descendants. In course of time the strictness of this rule became relaxed, and at length it was settled, that every estate should be

Collateral heirs of the *purchaser.*

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Old law of inheritance.

considered to have been inherited from an indefinitely remote period, in the family of the most remote ancestor from whom it could be proved to have descended; so that a newly purchased fee, or *feudum novum*, was descendible *ut feudum antiquum*. Thus, if A. purchased an estate and died, his heir might be sought for among any of his collateral relations; so that, if none could be found on his father's side, those on his mother's side were admitted. But if A. died seised of an estate which he had inherited from his mother, and it could not be shewn that his mother had acquired it by inheritance from any one, all of A.'s collateral relations on his mother's side were admitted, but none of those on his father's side. If it could be shewn that A.'s mother had inherited from her father, and the inheritance could not be traced farther back, then all A.'s collateral relations on his maternal grandfather's side, and those only, were admitted. At the limit where the chain of inheritance ended, by reason either of inability to trace it farther, or of the fact that a purchase had then been made, the representative of the fictitious remote ancestor was sought for on certain assumptions of probability, it being supposed that the descent was more likely to have come uninterruptedly through males than through females; whence the rule, that the descendants of the nearest male ancestor (the father) stood the first, then the descendants of the next male ancestor, (the father's father), and so on; and that when the line of male ancestors first became broken, the descendants of the next female ancestor of the most remote male ancestor, who had thus been reached through an uninterrupted line of males, came before the descendants of any female ancestor of any nearer male ancestor; so that, supposing none of the family of the father of the paternal grandfather could be found, the descendants of the paternal grandfather's mother were preferred to the descendants of the paternal grandmother; *ante*, p. 126.]

Preference of male ancestors.

[In thus tracing the descent from a fictitious ancestor of remote antiquity, several inconsistencies and absurdities of necessity arose. Thus, if the purchaser of an estate died without issue, but leaving an elder brother, such elder brother would succeed to him, on the supposition that the estate had descended from their common parent, although such a descent to the person last seised (the younger brother) could obviously never have occurred. So, when it was considered that the collateral relations of the half blood were less likely to have descended from the common ancestor than relations of the same degree of the whole blood; a probability, which could only exist in half the number of the possible cases, but from

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which, however, the rule was deduced, that no one related by the half blood to the person last seised could inherit, but the land should rather escheat; even in cases where the descent was actually traced, and the descent of such relation of the half blood from a former owner established. *Anon.*, Lofft, 396. The strictness of this rule stood in remarkable contrast to the laxity allowed in applying the other rule by which the male was preferred to the female line, and which was departed from whenever the estate could be shewn to have actually descended from a female.]

Descent in tail.

[In descents under entails, the heir of the original purchaser always succeeded, so that the rule excluding the half-blood, and that requiring the descent to be traced from the person last seised, had no application. *Doe* v. *Whichelo*, 8 T. R. 213. In fact the devolution of an estate tail is not properly by descent, but by a succession of purchases, authorised by the Statute de Donis, each individual succeeding in order as a purchaser by description named in the gift; and so far from claiming through, or as heir to any of his ancestors, that he was at common law unaffected even by the corruption of blood incident to the attainder of such ancestor. *Dowtie's case*, 3 Rep. 10; *Digby's case*, 8 Rep. 165 a.; *Mantell* v. *Mantell*, Cr. El. 28. So *possessio fratris* does not apply to such estates. *Doe* d. *Gregory* v. *Whichelo*, 8 T. R. 211.]

Breaking the descent.

[It has been seen that if a person succeeded to an estate as heir to his mother, and died seised of such estate, having no descendants, his collateral heir on the mother's side, and not his heir on the father's side, would succeed him. But if the seisin was interrupted, so that the estate was entirely divested out of the person who thus acquired it in the first instance by descent, and the estate by any means came back again to the same person, then, as he could not be said to have the same estate in the land which descended to him from his mother, but had acquired a new estate by purchase, the claim of his collateral heir on the father's side was let in.]

[In order to break the descent in this manner, the heir *ex parte maternâ* must have lost his old estate and acquired a new estate; therefore, if he conveyed away the whole fee, and limited back an estate to himself and his heirs, or to his heirs alone, in fee-simple or in tail, the descent was not changed, for so much as was limited back to himself was his old reversion, and a man could not purchase of himself. So, if he does not part with the whole estate, the reversion which he retains will descend in its old course. Co. Litt. 22. b. See *Doe* d. *Newby* v. *Jackson*, 1 B. & Cr. 448: *Harris* v. *Bp. of Lincoln* 2 P. Wms. 135. And he cannot, at common law, limit an estate to

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his own heirs in tail, for that would be to convey to himself. Co. Litt. 22. b.: See *Wills* v. *Palmer*, 2 W. Bl. 687. But if he once allows the legal fee to vest in another, (otherwise than as mere releasee to uses), any subsequent conveyance of that fee back to him confers a new estate. Co. Litt. 12. b. 22. b. ; *Doe* d. *Harman* v. *Morgan*, 7 T. R. 103. Thus a renewed lease of an estate *pur autre vie* descendible, does not follow the course of the surrendered lease. A reservation of rent in a conveyance in fee is not a reservation of any part of the reversion, therefore such rent shall descend *ex parte paternâ*. Co. Litt. 12. b. But it is otherwise if a reversion in the land is also reserved ; for then the rent is incident to such reversion, and descends with it. Ib. And a condition, it is said, is not an incident to the reversion, but shall descend to the paternal heir, but for the benefit of the maternal heir. Co. Litt. 12. b.; Plowd. 57, a. See Rob. Gavelk. 159. 3rd ed.; 2 Prest. Abst. 427.]

[A partition between coparceners does not change the descent, for each parcener is seised of his allotment as of his old estate ; and even if a rent is granted to one for equality of partition, such rent is held as if it had descended from the common ancestor. Co. Litt. 169. b., 177. b.: *Thetford* v. *Thetford*, Sav. 113 : Com. Dig. *Parceners* (C. 15). And where one parcener had sold his share, and conveyed it away by lease and release, after which the purchaser joined with the other parcener in a partition, which was effected by a conveyance of the entirety to uses, it was held that the descent of the share which was limited back to the use of the parcener in fee, was unchanged. *Doe* d. *Crosthwaithe* v. *Harris*, 1 Nev. & Per. 255.]

[Another way of changing the descent is, in the case of an equitable fee, by acquiring the legal estate, if that is descendible in a different manner ; for upon the union of the legal and equitable fees, and the consequent merger of the latter, the entire interest follows the legal estate. *Goodright* d. *Alston* v. *Wells*, 2 Doug. 771 : *Doe* d. *Balch* v. *Putt*, Id. 773 : *Phillips* v. *Brydges*, 3 Ves. 126 : *Selby* v. *Alston*, Id. 339 : *Langley* v. *Sneyd*, 1 Sim. & Stu. 55. See *Doe* d. *Harman* v. *Morgan*, 7 T. R. 103. Where an infant inherited an equitable estate *ex parte maternâ*, and died under age, it was held, that, there being no equity between the different classes of heirs, it could not be considered that a conveyance of the legal estate would have been called for by the deceased heir, had he been capable, *Langley* v. *Sneyd*, 1 Sim. & Stu. 45.]

[A devise in fee by the ancestor to his heir, whether by name or by description as such, did not change the descent, even in the case of copyholds, which passed by a surrender, made in the

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ancestor's lifetime; and the creation of particular estates or incumbrances made no difference. *Emerson* v. *Inchbird*, Lord Raym. 728: *Reading* v. *Rawsterne*, Id. 829: *Plunket* v. *Penson*, 2 Atk. 293: *Smith* v. *Triggs*, 1 Strange, 487: *O'Keefe* v. *Jones*, 13 Ves. 412: *Goodtitle* d. *Castle* v. *White*, 2 N. R. 383: *Wills* v. *Palmer*, 2 W. Bl. 687: *Chaplin* v. *Leroux*, 5 Mau. & Sel. 14: *Langley* v. *Sneyd*, 1 Sim. & St. 45; 7 J. B. Moore, 165: *Doe* d. *Pratt* v. *Timins*, 1 B. & Ald. 530: *Manbridge* v. *Plummer*, 2 Myl. & K. 93: *Wood* v. *Skelton*, 6 Sim. 176. But a devise in tail or for any other particular estate, (but not for an estate in fee subject to an executory devise, *Doe* v. *Timins*, 1 B. & Ald. 530), or to the heir jointly with another, or of lands descendible at common law, to the testator's heir by the custom of gavelkind, or *vice versâ*, or to the testator's collateral heir *ex parte paternâ*, gave an estate by purchase to the heir, and (when the inheritance passed) changed the descent; and a devise of the whole estate to one of several co-heirs gave the entirety to such heir by purchase. Plowd. 545, b.; 1 Roll. Rep. 317; Godb. 94, cas. 105; 2 W. Bl. 687; 1 H. Bl. 1; Prec. in Ch. 464; Amb. 8; 2 Vern. 732; 2 Burr. 1106; Palm. 373; 2 Roll. Rep. 352. See Harg. Co. Litt. 24. b., n. 3: *Doe* d. *Andrew* v. *Hutton*, 3 B. & P. 643. But a devise to the heir and another in common was the same thing as a devise merely of a moiety to the stranger, and did not give the heir an estate by purchase in his moiety. See Watk. on Descents, 178, 4th ed. But if the heir could not take the estate in the same way as he would have done by descent, the gift to him operated; as in *Beare's case*, Goldsb. 88; 1 Leon. 112, where it was held, that a devise of lands in gavelkind to the testator's sons, equally to be divided, gave them an estate by purchase, and would have done so without words of division.]

Canons of descent according to Blackstone.

[This part of the subject may be concluded by stating the seven canons or rules of descent in the words of Blackstone:—

I. That inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*; but shall never lineally descend (*a*).

II. That the male issue shall be admitted before the female.

III. That where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether (*b*).

(*a*) [See *Cowper* v. *Cowper*, 2 P. Wms. 734. But a father might inherit to his son as *cousin*: *Eastwood* v. *Vincke*, 2 P. Wms. 614: another inconsistency in the old doctrine.]

(*b*) [As to the rights of coparceners, in respect of an advowson, see Co. Litt. 186. b: *Barker* v. *Lomax*, Willis, 659: *Richards* v. *Earl of Macclesfield*, 7 Sim. 257.]

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Blackstone's canons.

IV. That the lineal descendants *in infinitum* of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

V. That on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.

VI. That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

VII. That in collateral inheritances, the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have in fact descended from a female.]

Customs of gavelkind and Borough English.

Customary Descents.]—[The descent of copyhold lands is invariably regulated by the custom of the manor; and even in regard to freeholds, the general rule of descent admits of exceptions; of which the most considerable occur in the cases of lands held by the tenure of gavelkind; which, whether purchased in fee-simple or in fee-tail, and whether in possession, remainder, or reversion, descend to all the sons in equal shares, corresponding with the course of descent by the general law among females, Litt. sect. 265; Dyer, 179, pl. 45; and of burgage tenements, held by the tenure of Borough English, which go to the youngest son. See *Lutwyche* v. *Lutwiche*, Forr. 976; Litt. sect. 603. Between the two customs there is this material difference, gavelkind extends to brothers and other collateral relations; *Godfrey* v. *Bullock*, Roll. Ab. 623, pl. 3; Id. 780; (Co. Litt. 140. a.; 2 Watk. Cop. 313; Rob. Gavel. 92;) Borough English does not. Hence, if a person seised of lands held by the tenure of Borough English, dies without issue, leaving brothers, the eldest, according to the general law, and not the youngest, as by the custom, will inherit. See *Denn* d. *Goodwin* v. *Spray*, 1 T. R. 466; Watk. Des. 113; Com. Dig. *Borough English;* Co. Litt. 110. b; Cro. Car. 411; Roll. Ab. 624; and so, if a custom is found that lands shall descend to all the *sons*, it shall not be extended to let in all the brothers, for that would be to interpret the finding as of a custom that lands shall descend *after the manner of gavelkind.* See *Ratcliffe* v. *Chaplin*, 4 Leon. 242: *Clements* v. *Scudamore*, 1 P. Wms. 63; 2 Lord Raym. 1024; Salk. 243: *Payne* v. *Barker*, Orl. Bridg. 18: *Doe* d. *Foster* v. *Sisson*, 12 East, 62: *Locke* v. *Colman*, 1 Myl. & Cr. 423. But descents in

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tail are impliedly governed by a custom affecting descents in fee-simple. *Doe* d. *Garrod* v. *Garrod*, 5 B. & Ad. 95: *Trash* v. *Wood*, 4 Myl. & Cr. 324: Harg. Co. Litt. 10 a., n. 3. The descent of an equitable interest follows that of the legal estate as soon as the trust is executed; but while it is executory, the common-law heir is entitled. *Roberts* v. *Dixwell*, 1 Atk. 609: *Hale* v. *Hale*, cit. in *Clements* v. *Scudamore*, 2 Lord Raym. 1024.] Customary descent.

[The right of the issue as representing their parents is recognised in descents according to Borough English as well as gavelkind, and in customary descents generally. See *Clements* v. *Scudamore: Blackburne* v. *Graves*, 1 Mod. 102: *Crump* v. *Norwood*, 7 Taunt. 362. And the doctrines which apply to coparceners at the common law govern also descents in gavelkind, which are indeed nothing else than descents in coparcenary. Litt. sect. 265. Thus, the entry of one heir in gavelkind was the entry of his co-heirs. (*Ante*, p. 125).] Representation, &c.

[The interest of an unadmitted surrenderee of copyhold descendible in gavelkind or Borough English, is descendible according to the custom. *Barker* v. *Denham*, 1 Vent. 261; 1 Mod. 102; 17 Vin. 259, pl. 6. But a special custom, regulating the descent of the land of every *tenant dying seised*, was held not to apply to the case of a surrenderee dying before admittance. *Hale's case*, cit. 1 P. Wms. 65; Salk. 243: *Payne* v. *Barker*, Orl. Bridg. 18.] Admittance.

[The customs of gavelkind and Borough English apply to heirs named as special occupants. Co. Litt. 110. b.; Salk. 244: Lord Raym. 1028; 2 Vern. 226.] Special occupancy.

[It appears that the half blood was excluded in customary descents, as much as at common law. Rob. Gav. 131.] Half blood.

[As to the distinction taken between conditions in gross and conditions incident to a reversion, that the former, when they relate to lands in gavelkind, &c., can only be taken advantage of by the heir at common law, though for the benefit of the customary heir, see the authorities cited, Rob. Gavelk. 159, 3rd ed., and 2 Prest. Abst. 427.] Conditions.

[Lands of gavelkind tenure do not escheat upon an attainder for murder, but descend to the heir free from the king's claim to a year, day, and waste, according to the proverb— Escheat.

> "The father to the bough,
> And the son to the plough;"

a custom which applies to descent from brother to brother as well as from father to son. And the widow is dowable. But if the accused person does not submit to his trial, but is outlawed, the custom does not prevent escheat, or deprive the king of the year, day, and waste. Rob. Gavelk. B. 2, ch. 4. This custom (except,

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perhaps, in one or two places) applies to gavelkind lands out of Kent. Ib.]

Gavelkind. Rent-charges.

[Rent-charges granted out of lands in gavelkind before the time of memory, are descendible according to the custom, and so, of course, are rents of modern creation, when incident to the reversion. But whether a rent-charge newly created, and not incident to any reversion, is descendible to the heir at common law, or to the customary heir, has been disputed. Principle seems to be in favour of the common law heir, but the weight of authority is against his claim. See *Randal* v. *Writtle*, 2 Lev. 87; 1 Freem. 105, 345; 3 Keb. 165, 214; *S. C.* 1 Vern. 489, cit., and Rob. Gavel. 101, 3rd ed. Where one rent-charge is granted out of lands descendible at common law, and lands in gavelkind, on the death of the grantor, the rent shall not be apportioned, but all shall go to the heir at common law. Id. 106. But it is otherwise of a rent-service reserved out of lands of different tenure, for there the reversion being divisible, the rent which is incident to it shall be apportioned. Co. Litt. 148. a., 215. a.; 4 Rep. 120 b.; Dy. 5 a; *infra*, Vol. 4, p. 334.]

Tithes.

[Impropriate tithes, issuing out of gavelkind lands, as they derive their origin from the dissolution of the monasteries, an event within legal memory, are not, it is clear, within the custom. See *Doe* d. *Lushington* v. *Bp. of Llandaff*, 2 N. Rep. 491: *Sands* v. *Drury*, 4 Gwill. 1569.]

What lands subject to the custom of gavelkind.

[The custom of gavelkind prevails with respect to socage lands over almost the whole of the county of Kent, and in a qualified manner over copyhold lands in various parts of the kingdom (*a*),

(*a*) [In Mr. Robinson's Treatise on Gavelkind, (pp. 42 and 49, 3rd ed.) the following places are mentioned, on various authorities, as subject to the custom of descent in gavelkind:—

The lands within the fee of *Pickering*, in *Norfolk*.

The *Soke* of *Rothelay* in *Leicestershire*.

The port of *Rye*, and many other places in *Sussex*. (1 Sid. 137.)

The manors of *Monmouth Usk*, and *Trelleg*, and many other manors in *Monmouthshire*.

Many places in *Shropshire*.

The territory of *Urchinfield* in *Herefordshire*.

Kentish Town, near *Highgate*.

The manors of *Stepney* and *Hackney*, of *Canbury* otherwise *Canonbury*, and *Newington Barrow*, otherwise *Highbury*, both at *Islington*, in *Middlesex*.

The manors of *Askham*, *Lancham*, and *Sutton-cum-Lound*, in *Nottinghamshire*.

The fee of the *Marshal*, in *Norfolk*, *Saxham*, near *Bury*, in *Suffolk*.

In Mr. Sawkins's note to the same word, (3rd ed. p. 391), it is stated, that lands in the following manors are descendible after the custom of Borough English:—

St. John of Jerusalem, Islington, Middlesex.

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Gavelkind.

Upon this subject the following remarks of the Real Property Commissioners, (3rd Rep. p. 11), are important:—"There appears to be a growing danger of questions arising as to what lands in Kent are exempt from the custom of gavelkind. A gentleman of great eminence at the bar, who has become a purchaser of large estates in Kent, being asked whether there be any prevailing uncertainty on the subject, says, 'I think it very probable that questions may arise upon the subject; you find it generally laid down that all lands in Kent are gavelkind, and that therefore no great inconvenience arises; it must be very clearly proved they are not gavelkind; and it is said such proofs cannot be given. I bought an estate the other day, where it was perfectly clear it was not gavelkind. I have purchased three estates in Kent, where I am perfectly satisfied none of them are of gavelkind tenure; and now the records are thrown open by the Parliamentary Commissioners, I have no doubt many more such will be found.' He afterwards goes on to state, that he has no doubt that some lands in Kent were held *in capite*, and never were gavelkind, and that there are many monastery lands in the county which were held in Frankalmoign, and which may not be gavelkind He adds, that on a purchase of lands in Kent there is an additional expense in ascertaining whether it is gavelkind or not" (*a*).

Sutton Court, Middlesex.

Surrey.—Weston Gumshall, in Albury; Colley, in Reigate; Sutton next Woking, in Woking; Little Bookham, in Little Bookham and Effingham; Wotton, Abinger, Paddington, Paddington Pembroke, respectively in the parishes of Wotton, Abinger, Ewhurst, and Cranley: Gumshall Towerhill, Gumshall Netley, Shere Vachery, and Cranley, and Shore Eborum, in the parishes of Shere Ewhurst, and Cranley; Dunsford, in the parish of Wandsworth; Compton Westbury; Brockham in Betchworth.

Boxted Hall, Essex.

A small part of the freehold and copyhold lands in Battel; Robertsbridge, Sussex.

The copyhold lands in Somersham with the Soke; Alconbury with Weston, Huntingdonshire.

In the following manors, the younger *brothers* (*ante*, p. 132,) inherit on failure of lineal heirs:—

Dorking, in Dorking and Capel; Milton and Wickott, in the parishes of Dorking, Capel, and Ockley, Surrey.

And in the following manors in Middlesex, all collateral males are admitted.

Isleworth Syon; Ealing, otherwise Zealing; Acton.

And in the following the youngest *female* relations, lineal and collateral, on failure of heirs male:—

Fulham, in Middlesex.

Wimbledon, including Putney, Mortlake, Roehampton, and Sheen, Battersea and Wandsworth; Downe; Barnes; Richmond, Surrey.

Southwell, Nottinghamshire.

Much Hadham, Hertfordshire.

(*a*) [See Appendix to 1st Report, p. 228. Examination of John Bell, Esq.]

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Gavelkind.

[" A recent case was proved to us in which a regular gavelkind title was shewn to lands in Kent; but the name of a person mentioned in one of the disgavelling acts appearing in the abstract, inquiries were made to ascertain whether the lands might not have been disgavelled, and by means of a county history and an *inquisitio post mortem*, it was ascertained that they had descended, on the death of the person named, to his common-law heir. They had afterwards been treated as gavelkind; and a legal estate being outstanding, the gavelkind heirs (who were infants) were declared to be infant trustees within the statute of Anne, and conveyed accordingly, each conveying only his share. The discovery induced counsel to treat the land as disgavelled, and to require a conveyance of the entirety from the common-law heir. This occasioned a new application to the Court of Chancery, the heir having died, leaving an infant son, who conveyed under the order of the court."]

As to presuming disgavelling or regavelling acts.

[" No lapse of time or adverse possession can alter the tenure; and where, from the inspection of ancient records which have recently become more accessible, it shall appear that lands long treated as gavelkind had once been held *in capite* or disgavelled, the gavelkind title can only be supported by resorting to the fiction of gavelling or regavelling acts, now lost, having been passed by the legislature."]

[With respect to this last suggestion of the learned commissioners, it must be observed that the operation of the Statute of Limitations renders it unnecessary to resort to any such fiction; for although no length of desuetude will alter the tenure of gavelkind land, and no usage will restore the ancient tenure of land which has once been disgavelled, yet the claim of any particular heir may at all times be barred by adverse possession under the Statute of Limitations. Any alteration by a court of law, therefore, of the unquestionable tenure, of the land, by presuming a disgavelling or a regavelling act, as the case might be, would not be justified by the only reason upon which such presumptions have hitherto been founded—the policy of vesting the legal right in those who have for a long period *de facto* enjoyed it. See Bro. Ab. *Custom*, 66; Fitzh. *Prescription*, 52.]

Presumption that lands are gavelkind.

[Lands in Kent are presumed to be of gavelkind tenure; out of it the presumption is the other way. Rob. Gav. B. 1, ch. 5. Lands in Kent formerly held by knight service, in Frankalmoign, or by any other than socage tenure, were not, and of course by the abolition of knight service during the Commonwealth, have not become, subject to the custom; nor can anything short of an act of Parliament alter

the tenure of gavelkind lands. Ib. See *Doe* d. *Lushington* v. *Bp. of Llandaff*, 2 N. R. 491.]

Disgavelling acts.

[The disgavelling acts are the 31 H. 8, c. 3, and six private acts, the last of which was passed in the 21st year of James I (*a*). These

(*a*) [The disgavelling acts, and the names of the persons whose lands they affected, are as follow:—

11 Hen. 7. Sir R. Guldeford.

15 Hen. 8. Sir Henry Wiat.

31 Hen. 8, c. 3.
Thomas, Lord Cromwell.
Thomas, Lord Burghe.
George, Lord Cobham.
Andrew, Lord Windsore.
Sir Thomas Cheyne.
Sir Christopher Hales.
Sir Thomas Willoughby.
Sir Anthony Seintleger.
Sir Edward Wootton.
Sir Edward Bowton.
Sir Roger Cholmley.
Sir John Champneys.
John Baker, Esq.
Reignold Scot.
John Guldeford.
Thomas Kemp.
Edward Thwaites.
William Roper.
Anthony Sandes.
Edward Isaac.
Percival Harte.
Edward Monyns.
William Whetnall.
John Fogg.
Edmund Fetiplace.
Thomas Hardres.
William Waller.
Thomas Wilford.
Thomas Moyle.
Thomas Harlakenden.
Godfrey Lee.
James Hales.
Henry Hussey.
Thomas Roydon.
Sir John Baker.
Sir Edward Wootton.
Sir Roger Cholmley.
Sir Thomas Moyle.
Sir John Gate.
Sir Edmund Walsingham.
Sir John Guldeford.
Sir Humfrey Style.
Sir Thomas Kempe.
Sir Martin Bowes.
Sir James Hales.
Sir Walter Hendley.
Sir George Harper.
Sir Henry Istey.
Sir George Blage.
William Roper.
Thomas Wylforde.
Thomas Harlakenden.
Thomas Colepepper, of Bedgebury.
John Colepepper, of Ailesforde.
Thomas Colepepper, son of the said John.
William Twisenden.
Thomas Darrel, of Scotney.
Robert Reedstone.
Thomas Robertes.
Steph. Darrell.
Richard Covarte.
Christopher Blower.
Thomas Hendley.
Thomas Harman.
Thomas Lovelace.
Reginald Peckham.
Herbert Fynche.
William Colepepper.
John Mayne.
Walter Mayne.
Thomas Watton.
John Tufton.
Thomas White.
Peter Hayman.
Thomas Argal.

2 & 3 Edw. 6.
Sir Thomas Cheyney.
Sir Anthony Seintleger.
Sir Robert Southwell.

1 Eliz.
Thomas Browne, of Westbecheworth, in Surrey,
George Browne.

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Disgavelling acts.

acts do not appear to have taken away all the customary incidents of gavelkind land, but only to have destroyed the partible descent. Thus it was adjudged upon the construction of the 2 & 3 Ed. 6, that lands disgavelled by that act did, notwithstanding, remain devisable by will according to the custom of Kent as to gavelkind. *Wiseman* v. *Cotton*, 13 Car. 2: Hard. 325; 1 Sid. 135; Raym. 59, 76; 1 Lev. 79: Rob. Gavelk. B. 1, ch. 5.]

New law of descent.

Descent, from whom traced.

[*Descent under the Stat.* 3 & 4 *W.* 4, *c.* 106.]—[The most important alteration in the law of inheritance which the statute of 3 & 4 W. 4, c. 106, effected, was the abolition of the rule "*seisina facit stipitem*," and the substitution for it of one which must frequently give rise to considerable difficulties in practice. The descent is to be traced from the purchaser; and the person last entitled (see sect. 1) to the land is to be considered as the purchaser, unless he can be shewn to have inherited it. In cases where estates have descended through two or three generations, the difficulty of tracing back the history of the title will be very great, and the result even after the utmost diligence, frequently unsatisfactory.]

[The word "*purchase*" is defined in the first section to mean any acquisition "otherwise than by descent, or than by any escheat. partition, (See Co. Litt. 177, b.), or inclosure, by the effect of which the land shall have become part of, or descendible in the same manner as, other land acquired by descent." The claim of the lord by escheat seems to be in the same nature as a right of entry for condition broken, and is therefore descendible with the seignory. See Watk. Desc. 2.]

[In a case falling within the operation of this act, where a person of illegitimate birth purchased an estate which descended to his only child who died without issue and intestate, it was held that the estate must escheat rather than go to the son's collateral relations on the mother's side. *Doe* d. *Blackburn* v. *Blackburn*, 1 Mood. & Rob. 547. The decision would of course have been the same under the old law.]

Alteration in lineal descents:

[The course even of lineal descents will frequently be affected under the operation of this enactment, in a manner which was cer-

8 ELIZ.
Thomas Browne, Esq.

Sir George Rivers, Knt.
Sir John Rivers, Bart.

21 JAC. 1.
Thomas Potter, Esq.

32 HEN. 8. c. 29, relates to the lands in Osweldbeck Soke, Nottingham.

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—descent of a coparcener's share.

tainly not contemplated by the framers of the act, and which is so inequitable and inconvenient, that the clause should be amended without delay. Upon the death of a son who inherited an entire estate immediately from the purchaser, his issue will be heir to his ancestor as well as to himself; but the share of a daughter or of a coparcener under a descent in gavelkind may become subject to a very different course of devolution from that which would have taken place under the old law. Thus, formerly, if one of two coheiresses died leaving a son, such son as heir to his mother took the entirety of her share; and for this purpose it was immaterial whether the mother had entered or not, provided her sister had entered, for that entry would have turned the descent as to the entirety. Hob. 120; Moore, 868; pl. 1201. But if neither had entered, then, it is apprehended, that the share of the deceased sister would have descended in the same manner as by the recent statute it will now descend in every instance; for, at the common law, descent was traced from the person last seised, who, if neither of the coheiresses had entered, would have been their ancestor; and the subsequent entry of the surviving coparcener would not, it seems, have set up the seisin of her deceased sister by relation, (as the endowment of a widow defeats the seisin of the husband's heir, *ab initio*), so as to alter the descent in this respect. Under the new law, the descent of the share of a deceased coparcener is required to be traced in all cases from the purchaser, and, in the case supposed, the heir of the purchaser is the son of the deceased daughter, together with the surviving daughter, so that the son would take only one-half of his mother's share, or one-fourth of the original estate; whereas, had his mother never come to the estate at all, but died in the purchaser's lifetime, he would have been entitled to half.]

[In a case within the editor's knowledge, an estate has already, by the effect of this clause, become subdivided into sixteenths, and must remain, during the next fourteen years, exposed to the danger of becoming further reduced to $\frac{1}{128}$ths by the death of an infant without issue (*a*). In descents according to the custom of gavelkind,

(*a*) [To see in how intricate a manner land may be apportioned under the new law, suppose that an estate descends among four daughters, A., B., C., and D.; that then,

First, A. dies intestate and without having broken the descent, and leaving three daughters; each of them will take($\frac{1}{3}$ of $\frac{1}{4}$ of $\frac{1}{4}$, or) $\frac{1}{48}$th of the original estate, and the shares of B., C., and D., will then amount to $\frac{5}{16}$ths each. Then,

Secondly, B. dies intestate, &c. leaving two daughters, each of whom

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this inconvenience must be of very frequent occurrence. So "difficult and dangerous a thing it is," as Blackstone remarks, "to depart from the rules of the common law, which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a while the texture of the whole."]

Descent among coparceners.

[In a case of this kind it is understood that opinions have been given in favour of the son's claim to the whole of the mother's share; but that such a claim cannot be supported will be evident when the wording of the clause and the nature of an estate in coparcenary are considered. The contrary opinion was perhaps founded on the following words of Littleton (sect. 313):—"If a man seised of certain land in fee hath issue two daughters, and dyeth, and the daughters enter, &c., and each of them hath issue a son, and die without partition made between them, by which the one moiety descends to the son of the one parcener and the other moiety descends to the son of the other parcener, and they enter and occupy in common and be disseised, in this case they shall have in their two names one assise and not two assises (*a*). And the cause is, that for that albeit they come in by divers descents, &c., yet they are parceners, and a writ of partition lyeth between them. And they are not parceners having regard or respect only to the seisin and possession of their mothers; but they are parceners, rather, having respect to the estate which descended from their grandfather to their mothers, for they cannot be parceners if their mothers were not parceners before, &c., and so in this respect and consideration, viz. as to the first descent which was to their mothers, they have a title in parcenarie, the which makes them parceners. *And also they are but as one heire to their common ancestor*, viz. to their grandfather, from whom the land descended to their mothers. And for these causes, before partition between them, &c., they shall have an assise, although they come in by several descents." And see Co. Litt. 164, a.; *Decharms* v. *Horwood*, 4 Moo. & Sc. 400. From which it seems to have been concluded, that as the son of the deceased coparcener and the survivor make

takes $\frac{5}{128}$ths, and C. and D. each have $\frac{25}{64}$ths; and A.'s children have each $\frac{9}{192}$nd parts. Then,

Thirdly, one of A.'s children dies intestate, &c., leaving a son, who takes $\frac{1}{256}$ths, and each of B.'s children then has $\frac{23}{512}$ths, and C. and D. have each $\frac{103}{256}$ths. If C. and D. had previously died, leaving children, the distribution would have been still more complicated.]

(*a*) [But if the disseisin were in the lifetime of the coparceners, their issue shall not join; because several rights descended to them from several ancestors; although when they have severally recovered they are coheirs, and one writ lies against them. Co. Litt. 164, a.]

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but one heir to the common ancestor, the descent of the whole estate which originally came from the ancestor must be traced over again. But this is obviously not the case; for the descent of the share of one coparcener cannot affect the share of the other, because, although as to strangers coparceners have for most purposes a joint seisin, they are not, as between themselves, for any purpose seised *per tout*, in the manner of joint tenants, their shares being in respect of title as distinct as are the shares of tenants in common. See Litt. s. 25; *Beare's case*, 1 Leon. 112: *Doe* d. *Crosthwaite* v. *Dixon*, 1 Nev. & P. 259. Thus, one may enfeoff the other of her share. Co. Litt 163, b., 164, a. On the death of a coparcener, therefore, the only estate upon which the act can operate is her own share; and it is declared that the descent of that is to be traced from the purchasing ancestor.]

[Partition between coparceners will make no difference in the descent of the share of each; for each parcener, after partition, is in of her old estate by descent, and that even of a rent granted for equality of partition. Co. Litt. 177, b. *ante*, p. 130; and see the word "Purchase" in sect. 1 of the act. If the surviving coparcener had previously aliened her share, it could not be contended for a moment that that share could be considered in tracing the descent of the others.]

Descent how changed.

[The class of purchasers within the second section is extended by the third, by virtue of which a devise by a testator to his heir, or a limitation in a conveyance, to the grantor or to his heirs, confers a new estate by purchase on the heir or grantor. Where in a conveyance the grantor takes the fee by way of resulting use, and not by express limitation, this enactment does not apply, and the grantor retains his old estate.]

Limitation to the heirs of a stranger.

[Formerly, if a stranger limited an estate to the heirs of a person, without giving any estate of freehold to that person, he who answered the description of heir at the time the limitation operated took a fee by purchase, which was descendible to his own heirs, as if it had been limited to him by name and his heirs; so that if the limitation were to the heirs of a woman, and she died, leaving issue two daughters only, such daughters would have taken a fee, (not in coparcenary, but in joint tenancy, or if words of severance were used, in common), descendible to their heirs collateral on the father's side. Cr. Eliz. 431; 3 Lev. 127; 3 Leon. 35; 2 Sid. 53, 78. And for the same reason, a limitation of lands of gavelkind tenure, to the heirs of A., gave an estate by purchase to the eldest son of A. as heir at the common law. Br. Ab. *Descent* 59; *Done*,

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42; Co. Litt. 10. a; 1 Rep. 101; Hob. 31; *Brown* v. *Barkham*, Pr. Ch. 461. But if the limitation were to the heirs special of any person, the estate descended in a *quasi* entail, to the persons who successively answered the description of heirs of the body of such person. Co. Litt. 13. a. 14. a.; Fearne, 82, 9th ed.; and if the limitation were to A. and his heirs on the part of the father, A. took a fee conditional on the existence of such heir. Co. Litt. 220. Where the ancestor to whose heirs an estate is limited, himself takes an estate of freehold by the same conveyance, the well-known rule in *Shelley's case* operates to carry the fee to such ancestor.]

New law of descent.

[Under the new law the descent in such cases is to be traced from the ancestor named, as if he had been the purchaser, whether the limitation is to the heir in fee-simple or to the heirs in tail. (Sect. 4). The effect of this enactment, where the limitation is of land which is subject to a customary descent, must be, it is conceived, to give the land to the customary heir, and not to the heir at common law, contrary to the rule which formerly prevailed.]

Gift to heirs.

[It needs scarcely be said that an opinion which has been broached, that a person who takes by purchase under the description of the heir of a given individual, is liable, under this act, in respect of the estates so acquired, to the debts of such ancestor, is erroneous; the act merely declares that the descent shall be traced as if the estate had been limited to the ancestor himself.]

Assets.

[It was with reference to the common-law rule that descent could not be traced through an alien, that the doctrine of *immediate descent* from brother to brother became of importance, and that doctrine was established in opposition to the opinion of Sir Orlando Bridgman and two other judges in the case of *Collingwood* v. *Pace*, 1 Lev. 49; 1 Vent. 413; O. Bridg. 410, in which it was decided, that natural-born subjects, born of alien parents, might inherit to each other as not needing to trace the descent through their common parents. See Co. Litt. 8, a. By the stats. 11 & 12 Will. 3, c. 6, and 25 Geo. 3, c. 39, descent may be traced through alien parents, provided the person claiming through them is in existence and capable of taking at the death of the person last seised; but this exception does not prevent the divesting of an estate out of the daughter of an alien on the birth of a brother or sister.]

Alien ancestor.

[By the fifth section of the act under consideration, no person is to be considered as inheriting immediately from a brother or sister, but through a parent.]

Collateral descent.

[By sects. 6 and 7 lineal ancestors are made capable of inheriting to their issue in preference to collateral relations claiming through

Lineal ascent.

them (*a*), the male line of ancestors and their descendants being preferred to the female line; in accordance with the preceding clause, by which brothers and sisters are to be considered as inheriting to each other, not immediately, but through their parent. Sect. 8 settles the question as to the relative claims of a grandfather's mother and her descendants, and a father's mother and her descendants, in favour of the former. See 2 Blackst. Com. 240 : *Davies* v. *Lowndes*, 7 Scott, 22, 27, 56.]

New law of descent.

Preference of remote male ancestor.

[By the tenth section, that which would have flowed as a necessary consequence from the enactment of the fifth section is modified, and relations of the half blood, while they are admitted to inherit, are (perhaps without any just reason) postponed to relations of the same degree of the whole blood. This provision applies of course exclusively to the relations of the half blood to the persons from whom the descent is to be traced. Thus, if A. purchases and dies, leaving a son and daughters by a first wife, and a son by a second wife, and the eldest son enters and dies, his brother of the half blood shall succeed in preference to his sisters of the whole blood; for the younger son, though of the half blood to the person last seised, is not of the half blood to the purchaser, from whom the descent is traced.]

Half blood.

[Sect. 10 allows a descent to be traced through a deceased person, notwithstanding his attainder. *Vide infra*, Vol. 4, p. 71.]

Attainted ancestor.

[The act applies to all descents happening, and to all limitations contained in assurances made, or in wills of persons dying, after the 31st of December, 1833; and includes within its operation, every kind of property, and every estate and right, descendible to heirs, whether according to the common law of England, or by the custom of gavelkind, or Borough English, or any other custom. (sects. 1, 11, 12.)]

What cases are governed by the new law.

(*a*) [The eviction of an uncle or nephew by the birth of a brother or sister, which might have happened under the old law, is thus rendered impossible. See Co. Litt. 11, b. This enactment may frequently occasion hardship under settlements, unless care is taken to guard against its effects. Thus, if, under a marriage settlement, land coming from the wife is taken by a son in fee, on the death of such son without issue, the father will take in preference to any of the children of the marriage, from whom he may entirely remove it by a sale. In such a case, unless this consequence is prevented by strict limitations, it would have been better to have left the fee in the mother, so that the course of descent might not be changed. In the case under section 2, of descent from a coparcener, similar hardship might arise from neglect to break the descent. The proposed enactment, that a donor of an estate in fee might direct that such estate should descend as if it had come from a particular ancestor, (1st Real Prop. Rep. 14), would have afforded a convenient remedy for the first of the inconveniencies above alluded to.]

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Stat. 3 & 4 Will. 4, c. 106. (Royal Assent, Aug. 29, 1833.) "*An Act for the Amendment of the Law of Inheritance.*"

[This act is as follows :—

Sect. 1 enacts, "That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows : (that is to say), the word "*land*" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or Borough English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title, of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "*the purchaser*" shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "*descent*" shall mean the title to inherit land by reason of consanguinity as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue, and the expression "*descendants*" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "*the persons last entitled to land*" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "*assurance*" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male."

Meaning of words in the act:

"Land."

"The purchaser."

"Descent."

"Descendants."

"Person last entitled."

"Assurance."

Number and gender.

Sect. 2. "That in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for

Root of Descent.—Descent shall always be traced from the purchaser, but the

the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

last owner shall be considered to be the purchaser unless the contrary be proved.

Sect. 3. "That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

Limitation to Heir or Grantor.—Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

Sect. 4. "That when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land."

Limitation to Heirs as Purchasers.—Where heirs take by purchase under limitations to the heirs of their ancestor, descent to be traced as if the ancestor purchased.

Sect. 5. "That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent." (*a*).

Brothers, &c., shall trace descent through their parent.

Sect. 6. "That every lineal ancestor shall be capable of being heir to any of his issue: and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so

Lineal ancestor may be heir in preference to collateral persons claiming through him.

(*a*) [See *Collingwood* v. *Pace*, Orl. Bridgman, 410; 1 Vent. 413.]

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that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue."

The male line to be preferred.

Sect. 7. "That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."

The mother of the more remote male ancestor to be preferred to the mother of the less remote male ancestor.

Sect. 8. "That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants."

Half blood.—Half blood to inherit after the whole blood of the same degree.

Sect. 9. "That any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother." (*a*).

Attainder.—After the death of a person at-

Sect. 10. "That when the person from whom the descent of any land is to be traced shall have had any relation who, having been

(*a*) [This clause is rendered obscure by an attempt at explanation or precision that would have been quite superfluous, had it preceded instead of following the 7th and 8th sections, which place the collateral relations next after the male ancestor from whom they derive that relationship, and which also provide, that the female ancestors are not to be resorted to until the male line is

attainted, shall have died *before such descent shall have taken place*, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four."

tainted, his descendants may inherit.

Sect. 11. "That this act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four."

Act not to extend to any descent before 1st Jan. 1834.

Sect. 12. "That where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four."

Limitations made before the 1st Jan. 1834, to the heirs of a person then living, shall take effect as if the act had not been made.

[In the annexed Table of Descent the Arabic figures indicate the order of succession according to the new law, and the Roman numerals indicate the order according to the old law, supposing the person called in the Table the purchaser to have been the person last seised. The Table shews also the order in which, under the new law, an estate inherited from the purchaser by any one of the individuals included in the Table would descend from that individual. (*Vide ante*, pp. 138, 139).]

Table of descent.

exhausted. By the 6th section, such female ancestor is to take in preference to her issue; from which it follows that (as all the descendants of a female ancestor who are of the whole blood to the *propositus*, are also descendants of the male ancestor, and must therefore have been already exhausted before the female ancestor is resorted to) her descendants of the half blood, being the only collateral relations left, must take *immediately* after her. In other words, the collateral relations of the half blood take *after* the common ancestor, whether male or female, by virtue of the express enactment in section 6; they take also after the collateral relations in the same degree of the whole blood, by the enactment of the 9th section; and because, before the female ancestor can be resorted to, there must be a failure of collateral relations of the whole blood, they take *immediately* after her. See the annexed table, numbers 15 and 20; 28 and 33; 12 and 25; 8, 9, and 38, 39; 42 and 55; 45 and 50; and 58 and 63.]

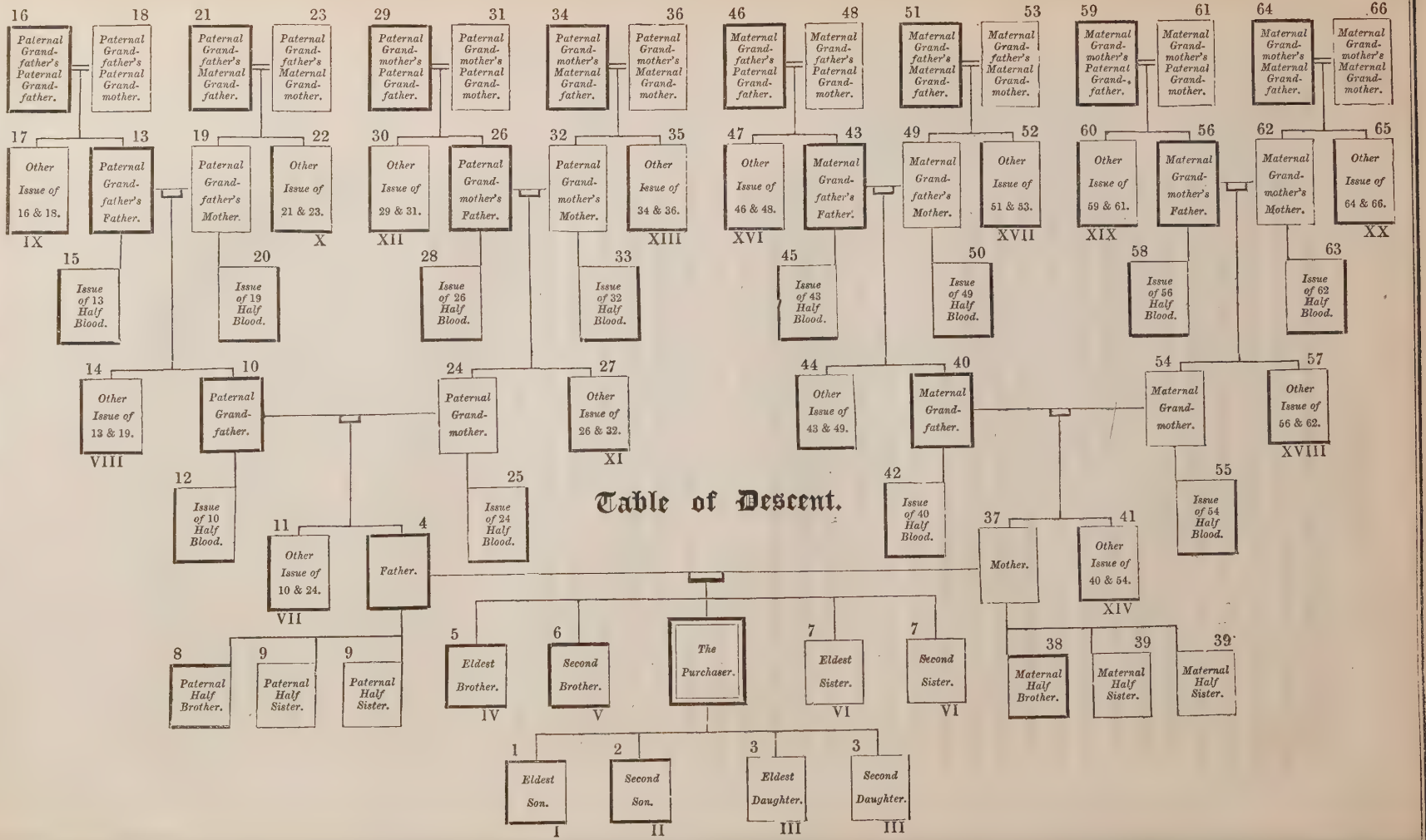
Table of Descent.
1 Eldest Son. I
2 Second Son. II
3 Eldest Daughter. III
3 Second Daughter. III
4 Father.
5 Eldest Brother. IV
6 Second Brother. V
7 Eldest Sister. VI
7 Second Sister. VI
8 Paternal Half Brother.
9 Paternal Half Sister.
9 Paternal Half Sister.
10 Paternal Grandfather.
11 Other Issue of 10 & 24. VII
12 Issue of 10 Half Blood.
13 Paternal Grandfather's Father.
14 Other Issue of 13 & 19. VIII
15 Issue of 13 Half Blood.
16 Paternal Grandfather's Paternal Grandfather.
17 Other Issue of 16 & 18. IX
18 Paternal Grandfather's Paternal Grandmother.
19 Paternal Grandfather's Mother.
20 Issue of 19 Half Blood.
21 Paternal Grandfather's Maternal Grandfather.
22 Other Issue of 21 & 23. X
23 Paternal Grandfather's Maternal Grandmother.
24 Paternal Grandmother.
25 Issue of 24 Half Blood.
26 Paternal Grandmother's Father.
27 Other Issue of 26 & 32. XI
28 Issue of 26 Half Blood.
29 Paternal Grandmother's Paternal Grandfather.
30 Other Issue of 29 & 31. XII
31 Paternal Grandmother's Paternal Grandmother.
32 Paternal Grandmother's Mother.
33 Issue of 32 Half Blood.
34 Paternal Grandmother's Maternal Grandfather.
35 Other Issue of 34 & 36. XIII
36 Paternal Grandmother's Maternal Grandmother.
37 Mother.
38 Maternal Half Brother.
39 Maternal Half Sister.
39 Maternal Half Sister.
40 Maternal Grandfather.
41 Other Issue of 40 & 54. XIV
42 Issue of 40 Half Blood.
43 Maternal Grandfather's Father.
44 Other Issue of 43 & 49.
45 Issue of 43 Half Blood.
46 Maternal Grandfather's Paternal Grandfather.
47 Other Issue of 46 & 48. XVI
48 Maternal Grandfather's Paternal Grandmother.
49 Maternal Grandfather's Mother.
50 Issue of 49 Half Blood.
51 Maternal Grandfather's Maternal Grandfather.
52 Other Issue of 51 & 53. XVII
53 Maternal Grandfather's Maternal Grandmother.
54 Maternal Grandmother.
55 Issue of 54 Half Blood.
56 Maternal Grandmother's Father.
57 Other Issue of 56 & 62. XVIII
58 Issue of 56 Half Blood.
59 Maternal Grandmother's Paternal Grandfather.
60 Other Issue of 59 & 61. XIX
61 Maternal Grandmother's Paternal Grandmother.
62 Maternal Grandmother's Mother.
63 Issue of 62 Half Blood.
64 Maternal Grandmother's Maternal Grandfather.
65 Other Issue of 64 & 66. XX
66 Maternal Grandmother's Maternal Grandmother.
The Purchaser.

EVIDENCE OF HEIRSHIP.

Evidence of Heirship.]—[J. Where a person deduces his title as heir general at common law of his father, the evidence required is not only that he is the legitimate son, but the eldest or only son of his parent. Certificates of his parents' marriage, and of his baptism, it is obvious, prove only the former fact; and some evidence should be adduced in support of the negative allegation, that there was no elder son; particularly if, upon the comparison of the dates of the marriage and birth, it seems that the interval between them was such, as to render it probable that there was an elder child; that is, if it exceeded twice the ordinary period of gestation; though the fact that less than such a period intervened is not conclusive in favour of the heirship, as there might have been twins; or the eldest child might have been born, but not procreated, after the marriage. If the alleged heir be a daughter, the negative evidence of course should extend to the fact of her being the only child; as a son, whether elder or younger, would take precedence; and a daughter, whether older or younger, would be entitled to an equal share[J.].]

Defect arising from alienage.

Aliens.]—[J. Here may be noticed a defect of title, which sometimes arises from a circumstance that does not appear on the face of the abstract, namely, that one of the parties through whom the title is deduced is an alien. The attention of the conveyancer is only attracted to the point when the name or address is evidently foreign: and yet, it is obvious, that John Smith of Cheapside, London, or any other person whose name or description would equally fail to excite suspicion of his not being one of her Majesty's liege subjects, might turn out to be a foreigner; he might not have been an Englishman, either by nativity or parentage. This often occurs in the case of illegitimate children, who, being *filii nullius*, are necessarily aliens, if born out of the British dominions.J.]

[As to the disability of aliens to hold lands (*a*), *vide infra*, Vol. 5, pp. 342, 622; Vol. 6, *Addenda*. A few points may be usefully mentioned in this place, as to the circumstances which constitute alienage:—

Who are aliens.

[An alien at common law was one who was not born "within

(*a*) [It seems that an alien may take chattels real as administrator or executor, because he has them *in autre droit*, *Caron's* or *Carvon's case*, Cr. Car. 9, pl. 6, cit. 1 Vent. 417; 2 Vin. Ab. 260, pl. 19: although he may not be guardian in socage; Per *Hale*, C. B., 1 Vent. 417.]

[As to the application of the English law respecting aliens, to the East Indies, and other conquered countries, see *The Mayor of Lyons* v. *East India Company*, E. F. Moore, 175. In the East Indies aliens may hold land. Ib.]

EVIDENCE OF HEIRSHIP.

Alienage.

the ligeance" of the monarch reigning in England, and of parents then in obedience to the monarch; 4 T. R. 308; and the British seas are within the Queen's ligeance. Bac. Ab. *Aliens* (A.). But it was not necessary, to constitute an individual an English subject, that he should be born within the kingdom of England—it was sufficient if he were born in any country which happened at the time to be subject to the individual then on the English throne, although such country was not annexed to the English *Crown*. Thus, the children born in Scotland after the accession (*a*) of James I. of England, of parents in obedience to the king, were not aliens; although those born there previously to the union of the crowns in one person, continued to be aliens after such union. This was the decision in *Calvin's case*, 7 Co. 1, where it was resolved that the only issue should be, whether the person was born under the ligeance of the king, in any of his kingdoms or dominions whatsoever; and also, that persons, originally subjects-born of England, could not be made aliens by any subsequent separation of the Crowns. See Lord *Bacon's* Argument, Works, Vol. 2, p. 519, ed. 1765. Thus, all persons born in the kingdom of Hanover, while that kingdom was united to the British Crown, are natural-born British subjects; and though, on the separation of the Crowns, such of them as were domiciled in Hanover ceased to be British subjects, they retain, in respect of land, &c., in Great Britain, the privileges of subjects-*born*. See *Calvin's case*, and Dyer, 224; Vaugh. 279, 281: *Jephson* v. *Riera*, 3 Knapp, 130: *Campbell* v. *Hall*, Lofft. 655; Cowp. 204.]

Issue of English subjects born abroad.

[The issue of aliens who are in the kingdom as enemies at the time of their birth, are aliens; and the issue of English subjects, born abroad, were at the common law subjects-born if their parents were then with an English army, acting hostilely. Vaugh. 281. So were the children of English ambassadors, born abroad. *Calvin's case*.]

Stat. 25 Ed. 3.

[The statute 25 Ed. 3, declared "That the king's children, wherever born, ought to inherit; and that all children, inheritors, who from henceforth shall be born without the ligeance of the king whose fathers and mothers at the time of their birth are and shall be of the faith and allegiance of the king of England, shall have and enjoy the same benefits and advantages to have and bear the inheritance within the same ligeance as other inheritors aforesaid; so always that the mothers of such children do pass the sea by the

(*a*) [*Vide ante*, p. 87, n.]

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license and wills of their husbands." See Cro. El.; 3 Cro. Car. 601, 602; 1 Sid. 198.]

Alienage. 7 Anne, c. 5, s. 3.

[The 7 Anne, c. 5, s. 3, enacted, ["That the children of all natural-born subjects, born out of the ligeance of her Majesty, her heirs and successors," shall be deemed natural-born subjects. See 10 Anne, c. 5. The 4 Geo. 2, c. 21, reciting that doubts had arisen on the construction of the act of Anne, enacts, by way of explanation, "That all children born out of the ligeance, &c. whose *father* shall be a natural-born subject, shall be deemed natural-born subjects;" but excludes from the operation of this enactment children of fathers attainted at the time of their birth of high treason, or liable, in case of their return to Great Britain or Ireland, to the penalties of high treason; and the children of fathers in the actual service of a foreign enemy; with certain exceptions out of this proviso of the children of such persons as returned to England or Ireland between the years 1708 and 1731, and continued to reside, &c. The 15 Geo. 3, c. 21, extended the provisions of the former acts to the children of *fathers* who, by operation of those acts, were natural-born subjects; but not so as to exempt them from the alien duties, &c., imposed by the 5 Geo. 1, c. 27.]

4 Geo. 2, c. 21.

15 Geo. 3, c. 21.

[By the effect of these acts, a person born out of the Queen's ligeance, whose father, or whose paternal grandfather was born within the Queen's ligeance, is to be considered a natural-born subject, except in the particular cases above alluded to. See *Doe* d. *Thomas* v. *Acklam*, 2 B. & Cr. 594. But no right is gained through the mother. *Doe* d. *Duroure* v. *Jones*, 4 T. R. 300; see 1 Vent. 422; and therefore it is indifferent whether she be alien or not. See Cr. Car. 602; 1 Vent. 427 (*a*).]

Natives of the United States.

[The father, under these acts, must not only have been a natural-born subject, but he must be a subject at the time of the birth of the child; therefore natural-born British subjects who continued to reside in the United States after the recognition of independence by the treaty of the 3rd September, 1783, thus ceasing to be British subjects, became unable from thenceforth to confer the privilege of British subjects on their children. *Doe* d. *Thomas* v. *Acklam*, 2 B. & Cr. 779. But children born in the United States after the recognition of independence, whose fathers had resided there previously to the separation of the countries, but at the time of the separation were absent from the United States and in employ by the

(*a*) [Of course, a natural born subject, son of an alien father, may inherit to his mother, she being a subject. Jenk. 203, pl. 27.]

EVIDENCE OF HEIRSHIP.

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British government, and afterwards settled in the United States, were held to be clearly within the above acts. *Doe* d. *Auchmuty* v. *Mulcaster*, 8 Dowl. & Ry. 593 : 5 B. & Cr. 771. See also *Doe* d. *Stansbury* v. *Arkwright*, 5 Car. & P. 575 : *Wilson* v. *Marryat*, 8 T. R. 31 ; 1 N. R. 430 ; *Re Bruce*, 2 Cr. & J. 436.]

[By the 9th article of the treaty of 1794, it was agreed that British subjects who then held land in the United States, or American citizens who then held lands in Great Britain, might hold and "grant, sell, or devise the same to those whom they should please, in like manner as if they were natives, and that neither they *nor their heirs* nor *assigns* should, so far as might respect the said lands and the legal remedies incident thereto, be regarded as aliens;" and

37 Geo. 3, c. 97.

by the act of the 37 Geo. 3, c. 97, s. 24, reciting that article, it is enacted that "all lands, tenements, and hereditaments in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which on the said 28th of October, 1795, (being the day of the exchange of the ratification of the said treaty between his Majesty and the said United States), were held by American citizens, shall be held and enjoyed, granted, sold, and devised according to the stipulations and agreements contained in the said article." Sect. 25 confines the benefit of the act to natural-born subjects of the realm, and citizens of the United States. These provisions are permanent and independent of any change in the pacific relations of the two countries. *Sutton* v. *Sutton*, 1 Russ. & Myl. 663; in which case Sir J. Leach, M. R., held that "the heirs and assigns of any American who held lands in Great Britain at the time mentioned in the act of 37 Geo. 3, are, so far as regards those lands, to be treated not as aliens, but as native subjects."]

Naturalization.

[Naturalization (which can only be by act of Parliament) gives to an alien and his issue all the rights of a natural-born subject, except those of filling certain offices, and of taking grants from the Crown, &c., (12 & 13 Will. 3, c. 2 ; 1 Geo. 1, st. 2, c. 4, s. 2);—a restriction which is sometimes removed in favour of eminent persons, (as in a recent occasion ; see stat. 3 & 4 Vict. c. 1), by a temporary repeal of the statutes creating it—and enables the alien to inherit to any of his ancestors, and to transmit lands to his children, being natural-born subjects, though born before the act of naturalization. Co. Litt. 129. a. 8. a. Thus, an alien wife, it was said, being naturalized after the husband had sold his land, should be endowed. Co. Litt. 33. a.; see Id. 31. b. n., Hale, MSS. And the ground of this retrospective effect of naturalization appears to be, that "an alien's disability to hold lands is neither a penalty nor a forfeiture."

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Aliens: naturalization.

Att.-Gen. v. *Duplessis*, 5 Br. P. C. 91; 2 Ves. sen. 286. But where, by an act of Parliament, an alien was naturalized "*from thenceforth*," and enabled to retain, &c., lands which he might or should have by purchase or gift, it was held that a title under a conveyance made by the alien previously to the passing of the act was not confirmed by it. *Fish* v. *Klein*, 2 Meriv. 431. But in a more recent case, where an alien had purchased chattels real, and settled them on his marriage, and afterwards became a denizen under letters patent, which expressly authorised him and his heirs to enjoy lands, &c., theretofore given, granted, or assigned *to* them, Sir *J. Leach*, M.R., seemed to be of opinion that the letters of denization would have amounted to a confirmation of the wife's title; but he held that, as she had exercised a power of appointment in favour of her husband, the question did not arise. His Honor said, "Upon this point the first consideration is, whether an alien, acquiring property, can, before office found, confer any right upon another. In the course of the argument I have already expressed my opinion, that an alien can confer no such right, and that as against the Crown, therefore, the wife acquired no right to the leasehold estate, although as against her husband she did acquire an interest. Thus it comes round to the same thing as if the husband had never attempted to depart with any interest in his wife's favour, but the whole had remained throughout vested in himself, and then the question will be, as it was in the case of the freehold, whether the subsequent letters of denization do not amount to a confirmation of his title. For the reasons already given, I am clearly of opinion that they do amount to such confirmation." *Fourdrin* v. *Gowdey*, 3 Myl. & K. 398. This is not very accurately reasoned. The wife made her will and died after the grant of letters of denization, and it is admitted that she had an interest as against her husband. He therefore had no title when the letters passed; the matter rested between his wife and the Crown. The letters of denization could not, then, operate as a confirmation to him; and it being held that, after the appointment by the wife, the alien had a title to the leaseholds, it follows that the letters must have operated to confirm the *wife's* title. That the gift here was by appointment and not under the wife's ownership can make no difference, it being clear, that if the Crown were entitled to the wife's interest, she would not be allowed to defeat that title by exercising a general power. *Vide infra*, Vol. 5, pp. 162, 172. The case, therefore, seems to be in direct opposition to *Fish* v. *Klein*. Unless the letters of denization expressly extend to confirm to the alien lands already purchased by him, the king may, it seems,

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seize them, notwithstanding his grant. Co. Litt. 310. b.; Bac. Ab. *Denizen*, pl. 7.]

Alienage: naturalization.

[Naturalization by the English Parliament, before the Union, extended to Ireland; but naturalization by the Irish Parliament had no operation in England. Com. Dig. *Alien* (B. 2.); stat. 10 Will. 3, c. 1. As to naturalization by seven years' residence in the American colonies, or taking the oaths, &c., see stat. 13 Geo. 2, c. 7; 20 Geo. 2, c. 44, and 13 Geo. 3, c. 25; by serving three years in the whale fishery, 22 Geo. 2, c. 45; by serving in the army in America, 2 Geo. 3, c. 25. None of these acts entitle aliens coming within their provisions to hold land in Great Britain or Ireland.]

Denization.

[Denization by grant from the Crown (*a*) has no retrospective operation, otherwise than by way of confirmation of any estate the alien may have already acquired. *Fourdrin* v. *Gowdey*, 3 Myl. & K. 383, *supra*. It does not give inheritable blood, or enable the denizen to take land at all by inheritance, except, under the recent act, as heir to his children born after the denization; nor, therefore, at common law, could any descent be traced through him; *Collingwood* v. *Pace*, 1 Vent. 413,419. And if a denizen purchase land, his son born after denization, it is said by Lord *Coke*, shall inherit, and not an elder son born before, although a natural-born subject, rather than go to whom the land shall escheat; so that a denizen had in fact no heirs besides his own children born after denization, and their issue. Co. Litt. 8. a.; Com. Dig. *Alien* (D. 2). See *Collingwood* v. *Pace*, 1 Vent. 413. But now that descent may be traced through an alien, it should seem that a son born before denization, unless he is himself an alien, shall inherit. See, however, a dictum by Sir *J. Leach*, M.R., *contra*, 3 Myl. & K. 402. The reason given by that learned Judge, that the issue born before denization has no inheritable blood, seems to be applicable with equal force to every case of a claim being made through an alien under the statutes 11 & 12 Will. 3, c. 6, and 25 Geo. 3, c. 39, *ante*, p. 142.]

Disabilities of Roman Catholics, 11 & 12 Will. 3, c. 4.

Roman Catholics.]—[The 11 & 12 Will. 3, c. 4, enacted, that a person, educated in the Popish religion, or professing the same, who did not, in six months after the age of eighteen, take the oaths of allegiance and supremacy, and subscribe the declaration against popery, of the 30th Car. 2, should, *in respect of himself only and*

(*a*) [As to the powers of the Crown in this particular, see statutes 32 Hen. 8, c. 16, and 47 Geo. 3, st. 2, c. 24.]

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not of his heirs or posterity, be disabled to inherit, or take lands by descent, demise, or limitation, in possession, reversion, or remainder; and that during his life, till he took the oaths and subscribed the declaration against popery, his next of kin, who was a Protestant, should enjoy the lands without accounting for the profits; and that such person should be incapable of *purchasing;* and that all estates, terms, interests, or profits out of lands, made, done, or suffered to his use or in trust for him should be void. The construction of the latter part of this enactment being doubtful, it was declared by the 3 Geo. 1, c. 18, that no sale for a full and valuable consideration by the owner or reputed owner of any lands, or of any interest therein, made or to be made to a Protestant purchaser, shall be impeached by reason of any disability of such Papist, or of any person under whom he claims, in consequence of the 11 & 12 Will. 3, unless the person taking advantage of such disability shall have recovered before the sale, or given notice of his claim to the purchaser, or, before the contract for sale, shall have entered his claim at the quarter sessions, and *bonâ fide* pursued his remedy. The act then, after reciting the clause of the 11 & 12 Will. 3, disabling Papists from purchasing, enacts, that those clauses shall not be thereby repealed or altered. See *Fairclaim* v. *Newland*, 8 Vin. Ab. 73, pl. 4: *Wildigos* v. *Keeble*, Id. pl. 5; 2 Ves. sen. 392: *Smith* v. *Read*, 1 Atk. 526: *Harrison* v. *Southcote*, Id. 528; 2 Id. 156, 210.]

3 Geo. 1, c. 18.

[These provisions against Papists were repealed by the stat. 18 Geo. 3, c. 60, as to all Papists, claiming under titles not theretofore litigated, who, within six months after the passing of the act or of their coming of age, should take the oath thereby prescribed. A different oath was substituted for this by the 31 Geo. 3, c. 32, and the 43 Geo. 3, c. 30.]

18 Geo. 3, c. 60.

[The stat. 1 Geo. 1, st. 2, c. 55, required Papists to register their names and real estates in books kept by the clerks of the peace, on pain of forfeiture of the fee-simple; two-thirds to the king, and one-third to the person suing for the same. Sect. 3 contains a saving in favour of purchasers for value without notice; and sect. 4 exempts persons not actually seised, &c., for the space of six months. See also 3 Geo. 1, c. 18, requiring, among other things, the enrolment of conveyances and wills made by Papists; 3 Geo. 2, c. 29. These acts were repealed by the 31 Geo. 3, c. 32, s. 21.]

1 Geo. 1, st. 2, c. 55, and 3 Geo. 1, c. 18.

[By stats. 1 Will. & M., sess. 1, c. 26, 12 Anne, st. 2, c. 14, s. 1, Roman Catholics and their trustees are disabled from presenting to any benefice; and the presentation to livings south of the

1 W. & M. sess. 1, c. 26, and 12 Anne, st. 2, c. 14.

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Trent is given to the University of Oxford; that to livings north of the Trent, to Cambridge; and by 11 Geo. 2, c. 17, from granting any advowson or right of representation vested in them at law or in equity, to any other than a Protestant.]

10 Geo. 4, c. 7, s. 23.

[By the Roman Catholic Relief Act, 10 Geo. 4, c. 7, s. 23, it is enacted, that no oath or oaths shall thereafter be tendered to, or required to be taken by his Majesty's subjects professing the Roman Catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to and required to be taken by his Majesty's other subjects.]

[On the construction and effect of the acts against Popish recusancy, see Com. Rep. 661; Bunb. 346; 1 Stra. 267; 9 Mod. 172, 223; Amb. 320, 767; 5 Br. P. C. 148, 384, 465, 472, 538; 1 P. Wms. 353; 2 Id. 3, 132; 3 Id. 46; 1 Atk. 526; 2 Id. 156, 210; 3 Id. 155, 457; 2 Ves. 398; 1 Wils., part 1, 176; Cas. tem. Hardw. 91, 149.]

Jews.

Jews.]—[The occurrence of a Jewish name in an abstract, is always a reasonable ground of inquiry whether the party was an alien. That Jews, who are not aliens, are disabled from holding land, is a vulgar error, into which even professional men have been sometimes known to fall. They are not even disabled from holding advowsons and presenting to benefices. See 10 Geo. 1, c. 4. (*a*).]

Attainder.

Attainder.]—[Another interruption to which the course of descent was liable, arose from the attainder of a person through whom it might otherwise have been traced. The effect of attainder for treason or murder was forfeiture of the lands of the offender, and corruption of his blood; so that he neither could inherit, nor transmit by inheritance. But, as in the case of an alien, children born after attainder might at common law have inherited to each other. See *Collingwood* v. *Pace*, 1 Vent. 413; Harg. Co. Litt. 8. a. The recent act allows descent to be traced through a deceased attainted person; and therefore the enactment, that brothers and sisters shall

(*a*) [The following singular passage occurs in Co. Litt. 31. b. "If a Jew born in England taketh to wife a Jew born also in England; the husband is converted to the Christian faith, purchaseth lands, and enfeoffeth another, and dieth; the wife brought a writ of dower, and was barred of her dower; and the reason yielded in the record is this:—*Quia verò contra justitiam est quod ipsa dotem petat vel habeat de tenemento quod fuit viri sui, ex quo in conversione suâ noluit cum eo adhærere et cum eo converti.*" There is no foundation for the inference which some have drawn from this passage, that a person professing the Jewish religion cannot hold lands in England. In Jenk. 3, *S. C.*, the purchase is said to have *preceded* the conversion.]

not inherit immediately to each other, has produced no practical alteration in this respect. See more on attainder, *infra*, Vol. 4, p. 70; and *Rex* v. *Inhabitants of Haddenham*, 15 East, 463.]

Heirship how made out.

[In establishing a descent, the first fact to be proved, under the new law is, that the person from whom the descent is traced was the purchaser. It has been already seen, (*ante*, p. 139), that an estate which has descended to the last owner, may frequently devolve upon persons very different from those who would inherit an estate which he had acquired by purchase. Hence the importance of discovering the original purchaser, and of ascertaining, where two successive descents appear upon the title, that the mesne ancestor did not do any act to break the course of descent, by divesting himself of the legal estate, and taking it again by purchase. (*Ante*, pp. 129, 141).]

Proof of seisin.

[Where the descent took place before the year 1834, it is necessary to make out the seisin of the supposed ancestor, unless he was himself the purchaser, (*ante*, p. 124). Actual occupation by an heir may be proved by affidavit, and possession by the ancestor's tenant will, in general, amount to a seisin in the heir, without any payment of rent, (*ante*, p. 125). Receipts for rent given by the heir, or a lease or the counterpart of a lease, made by the heir himself, are evidence of his seisin. See *Davies* v. *Lowndes*, 7 Scott, 22. Such, too, are declarations of a deceased occupier, as to the person of whom he held, which are admitted as declarations against the interest of the person making them, the possession of every occupier being *primâ facie* taken to be a seisin in fee, the identity of the lands being of course proved. *Peaceable* d. *Uncle* v. *Watson*, 4 Taunt. 16: see *Doe* d. *Human* v. *Pettet*, 5 B. & Al. 223: *Doe* d. *Baggalley* v. *Jones*, 1 Camp. 367. Assessments to the poor rates or land-tax are received in practice as evidence to the same effect; and an entry in the collector's book, that a given party had paid the rate as occupier of certain premises, has been held to be evidence of occupation, being an admission against the party's interest. *Doe* d. *Smith* v. *Cartwright*, 1 Car. & P. 218; 1 Ry. & Mood. 63. See *Harrison* v. *Blades*, 3 Camp. 457. So, the books of an insurance company, in which they charge themselves with the receipt of premiums, for the insurance of particular premises in the occupation of A. B., are evidence of his occupation. *Doe* v. *Cartwright*. But where it was shewn that the names of deceased proprietors were usually retained on the books until the estate was sold to a different family, the assessment to the land-tax was rejected as evidence of the seisin of a particular person. *Doe*

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d. *Stansbury* v. *Arkwright*, 1 Nev. & M. 731. But, if the assessment can be explained by other evidence, it may be received. *Doe* d. *Strode* v. *Seaton*, 4 Nev. & M. 81. Assessments to the land-tax have, since the year 1744, been filed with the clerk of the peace.]

Death and intestacy of ancestor.

[The death and intestacy of the ancestor are next to be proved. The regular evidence of death is the register of burial; intestacy as to the estate in question is, in ordinary practice, considered to be sufficiently proved by the production of letters of administration, or of the probate of a will containing no devise of the estate. The same documents are generally received by conveyancers as sufficient evidence of death. They are not, of course, legal evidence of that fact. *Thompson* v. *Donaldson*, 3 Esp. 63: *French* v. *French*, Dick. 268; 10 Ves. 289. It is sometimes proper to search for a will in the various Courts supposed to have jurisdiction.]

Hearsay evidence in matters of pedigree.

[In proving the relationship of the person proposed as heir, the practice of conveyancers is little more lax than the rules of law. As it would be impossible to establish descents according to the strict rules by which contracts are established and rights of property regulated, courts of law are obliged, in matters of pedigree, to depart from the ordinary rules of evidence, and to have recourse to a secondary kind of evidence—the best the nature of the subject will admit. 13 Ves. 143. Hence the admissibility of hearsay evidence in questions of this nature. But tradition generally is not evidence even of a pedigree. "The tradition must be from persons having such a connexion with the party to whom it relates, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and that they could not be mistaken. The whole goes upon that: declarations in the family,—declarations in wills,—declarations upon monuments,—declarations in Bibles and registry books—all are admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth (*a*); but there may be many considerations forming part of the tradition, which you would reject, taking the body of the tradition." *Per* Lord *Eldon*, C., *Whitelocke* v. *Baker*, 13 Ves. 514. See *Goodright* d. *Stephens* v. *Moss*, Cowp. 591: *Monkton* v. *Att.-Gen.*, 2 Russ. & M. 147. It is evidence, from the interest of the person in knowing

(*a*) [Upon a question of general interest in a parish or other district, evidence of declarations of deceased inhabitants of the parish, &c., is admitted in proof of reputation, notwithstanding the interest the parties making the declaration had in the matter. *Moseley* v. *Davis*, 11 Price, 162; 1 Phill. Ev. 250.]

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the connexions of the family. Therefore the opinion of the neighbourhood of what passed among acquaintance will not do. 13 Ves. 147. Upon this principle, inscriptions upon tombstones or mural monuments, which can be connected with the family, are admitted; as it must be supposed the relations of the family would not permit an inscription, without foundation, to remain; 1 Myl. & Cr. 356; and it is not necessary that the inscription should be in a burying-ground belonging to the established church. *Whittuck* v. *Waters*, 4 Car. & P. 376. So, engravings upon rings are admitted, upon the presumption that a person would not wear a ring with an error upon it. 13 Ves. 144.]

Whose declarations not admissible.

[Declarations by a servant or physician, however long and intimate his acquaintance with the family, are not admissible as evidence or reputation, on account of the impossibility of laying down a rule as to the degree of intimacy which would be sufficient. *Johnson* v. *Lawson*, 9 Moore, 193: *Doe* d. *Sutton* v. *Ridgway*, 4 B. & Al. 53. See 18 Ves. 446; 2 Russ. 76: *Slaney* v. *Wade*, 1 Myl. & Cr. 338: *Crease* v. *Barrett*, 1 C., M., & R., 928.

Declarations against interest.

But declarations by such persons, with respect to individual occurrences within their own knowledge, and in which they have an interest, may, under certain circumstances, be admissible. Thus, an entry by a deceased surgeon in his day-book, of an attendance at a birth, with a reference to his ledger, where there was a memorandum of payment, was admitted in proof of the time of birth, being an admission against his interest. *Higham* v. *Ridgway*, 10 East, 109. So an entry in the books of the Merchant Taylors' Company, that T. C. was admitted a freeman, as the son of J. C., deceased, is admissible to prove the relationship. *Collins* v. *Maule*, 8 C. & P. 502. See *Standen* v. *Standen*, 1 Peake, 34: *Barker* v. *Ray*, 2 Russ. 76: *Gleadow* v. *Atkin*, 1 Cr. & M. 428; see Id. 456.]

Declarations of husband.

[Declarations of a husband respecting his wife's family are admitted for the same reason as declarations of relations. *Vowles* v. *Young*, 13 Ves. 147: *Doe* d. *Northay* v. *Harvey*, Ry. & Mood. 297: *Doe* d. *Futter* v. *Randall*, 2 Moo. & P. 20. It seems that, except as between parent and child, the declarations of persons of illegitimate birth are not receivable as coming from relations. *Doe* d. *Bamford* v. *Barton*, 2 M. & Rob. 28.]

Declaration *post litem motam*.

[Declarations made after questions have arisen in the family respecting the matters which they are offered to prove, or in contemplation of disputes, especially by persons interested in the result, are not admissible. *Edwards* v. *Harvey*, G. Cooper, 39; *Berkeley Peerage;* 4 Camp. 404. See Id. pp. 407, 418: *Slane Peerage*,

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5 Cl. & Fin. 23. But, from the nature of the rule itself, declarations made *ante litem motam*, by a relation tending to shew his title as remainderman, are admissible. *Doe* d. *Filman* v. *Tarver*, Ry. & M. 141: *Monkton* v. *Att.-Gen.*, 2 Russ. & Myl. 159. The *lis mota*, or commencement of the controversy, is the time when the state of facts arose on which the claim is founded. *Walker* v. *Beauchamp*, 6 Car. & P. 552; see 1 Myl. & Cr. 356, *Slane Peerage*, 5 Cl. & Fin. 23; 7 Sim. 616.]

Entries in family Bibles, &c.

[Entries in family Bibles, pedigrees, &c. are admissible, as being declarations made by relations; and, on this ground it is immaterial, (so far as the admissibility of the evidence is concerned), in what book or on what piece of paper the entry is made, so that it be shewn to have proceeded from a member of the family. *Herbert* v. *Tucket*, T. Raym. 84; 4 Camp. 418; see p. 421: *Whittuck* v. *Waters*, 4 Car. & P. 375: *Monkton* v. *Att.-Gen.*, 2 Russ. & M. 162: *Hood* v. *Beauchamp*, 8 Sim. 26; *Slane Peerage*, 5 Cl. & Fin. 23. Recitals in settlements, to which relations were parties, or wills (*a*) owe their weight (as against strangers to the deed) entirely to the same rule. *Neale* v. *Wilday*, 2 Str. 1151; Bull. N. P. 233: *Doe* v. *E. of Pembroke*, 11 East, 504; 2 Peake, 204; *Vaux Peerage*, 5 Cl. & Fin. 526: *Welcome* v. *Upton*, 6 M. & W. 536; see *Fort* v. *Clarke*, *ante*, p. 121. Therefore they are not admissible to prove the pedigree of a person not related to any of the parties to the deed. *Slaney* v. *Wade*, 1 Myl. & Cr. 338. In the case of a pedigree hung up in a family mansion, the mere fact of its remaining is proof of its adoption by the family, without its being shewn to have been framed by any member of it. 2 Russ. & M. 163; see 5 Cl. & Fin. 539.]

Secondary hearsay evidence.

[It is not necessary that the hearsay should be in the first degree; that is, that the declarations offered should have related exclusively to matters within the personal knowledge of the party making, or even to matters which happened in his own time; and therefore, a person's declaration, that his grandmother's maiden name was A.B. is admissible, although he could not possibly have any contemporary knowledge of the fact. 2 Russ. & M. 158: *Zouch* v. *Waters*, 12 Vin. Ab. 244, pl. 5. See 1 Myl. & Cr. 355.]

Secondary evidence of family writings, inscriptions, &c.

[Even secondary evidence of the contents of lost writings, which would have been received as declarations of relatives, has been admitted. Thus, where it was shewn, that, prior to the year 1810, when a certain church was repaired, there was an inscription, in what was called the *Manton* chancel, where some of the *Manton*

(*a*) [If the question relates to a real estate, the fact of the statement in a will cannot be proved by the probate; but the ledger book of the Spiritual Court, or an authenticated copy of it, would be admissible, Bull, N. P. 246.]

family was buried, the evidence of a person who had made a pencil copy of the inscription, by the direction of the clergyman, when the church was being repaired, was held to be admissible in proof of the contents of the inscription; and it was also held, that the witness might refresh his memory by looking at the copy he had made, although the pencil marks had been inked over by the clergyman, in his anxiety to preserve it. *Slaney* v. *Wade*, 1 Myl. & Cr. 338. See *The Vaux Peerage*, 5 Cl. & Fin. 541. On the same principle, though a parish register affords no evidence of the time or place of birth; yet, if a statement contained in it as to those facts be shewn to have been made on the authority of a relation, it may be admissible. See *Rex* v. *North Petherton*, 8 Dowl. & Ry. 325; 5 B. & Cr. 508; *Rex* v. *Clapham*, 4 Car. & P. 29: *Morris* v. *Davies*, 3 Car. & P. 215, 427: *Lloyd* v. *Passingham*, 16 Ves. 59; G. Coop. 152.]

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[A pedigree, purporting to have been compiled from monumental inscriptions, family records, and *history*, was rejected. *Davies* v. *Lowndes*, 7 Scott, 22.]

[Declarations respecting pedigree may be *presumed* from the conduct of relations; or, in other words, their conduct may be equivalent to a declaration. Thus, "if the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy, till impeached; and, indeed, it amounts to a daily assertion, that the son is legitimate." Per Lord *Mansfield*, 4 Camp. 416. And, on the contrary, the use by a person and his descendants of a different name from that of his reputed father, was considered to be evidence of his illegitimacy. *Goodright* d. *Tompson* v. *Saul*, 4 T. R. 356. So, proof of enjoyment of an estate in strict settlement, by a younger son, at a time when recoveries had not been introduced, was admitted towards proving the death of his elder brother without issue. *Devon Peerage*, by Nicolas, App. 36. And proof of similar circumstances occurring at a late period, accompanied by an unsuccessful search at the Warrant of Attorney Office, and the King's Silver Office, was admitted. *Chandos Peerage*, 11. See Phill. Ev. 238.]

Implications from conduct.

[It was at one time doubted, whether hearsay evidence of the kind we have been considering, was admissible to prove the *age*, as well as the relationship of a person; but it is clear that the *time* of a birth, a marriage, or a death, is matter of pedigree, and therefore within the rule. "Declarations of the nature of pedigree, that is to say, of who was related to whom—by what links the relationship was made out—whether it was a relationship of consanguinity, or of affinity only—*when* the parties died, or whether they are

Declarations admissible in proof of *age*.

What are matters of pedigree.

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actually dead—every thing in short which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons, who, by evidence dehors those declarations, have been previously connected with the family respecting which their declarations are tendered." Per Lord *Brougham*, C., 2 Russ. & M. 156. In *Rider* v. *Malbone*, cit. 2 Russ. & M. 169, and *Herbert* v. *Tucknal*, T. Raym. 84, hearsay evidence as to dates was admitted; and see also *Goodright* d. *Stevens* v. *Moss*, Cowp. 503: *Kidney* v. *Cockburn*, 2 Russ. & M. 167: Vin. Ab. *Evid.*, T. 6. 91. So, to prove that an eldest son was born before marriage, declarations by himself that he was a bastard were admitted. *Cooke* v. *Lloyd*, Peake Ev., App. 78. And a statement in a will of the date of a relation's birth was admitted. *Williams* v. *Huskisson*, 3 You. & C. 80. But the *place* of birth is not matter of pedigree. *Rex* v. *Erith*, 8 East. 539.]

Presumption of death without issue.

[It may be added that, in cases of pedigree, persons presumed to be dead, are presumed to have died unmarried, and without issue. *Doe* d. *Oldnall* v. *Deakin*, 2 Man. & Ry. 195. *S. C. nom. Doe* d. *Oldham* v. *Wolley*, 8 B. & Cr. 22.]

Legitimacy.

[The legitimacy of a person is, for most purposes, determined by the law of the domicil of his parents; and a person born in England, of parents domiciled there, under circumstances which make him illegitimate there, although he would be legitimate in Scotland, is not to be considered as legitimate, even in Scotland, for the purpose of inheriting land there, nor for any other purpose. *Munro* v. *Ross* or *Sanders*, 6 Bligh, 468, and cases there cited. But a person born before wedlock in Scotland, of parents domiciled there, who subsequently married there (*a*), was held incapable of inheriting land in England; the legitimacy being determined with reference to the law of the country which governs the devolution of real property. *Doe* d. *Birthwhistle* v. *Vardill*, 8 Dowl. & Ry. 185; 5 B. & Cr. 438. Affirmed D. P. August, 1840; 1 Scott, N. R. 800; but see the admirable opinion of Lord Brougham, 9 Bligh, 32. The decision is certainly anomalous. See *Munro* v. *Ross*: *Brodie* v. *Barry*, 2 Ves.

(*a*) [If either of the parents marry with a third person, after the birth of their child, and before marriage with each other, the initial illegitimacy of such child is incurable according to the law of Scotland. 5 B. & Cr. 438. The law of legitimation by subsequent marriage is not admitted in Ireland, nor in most of the British possessions abroad, nor in the northern states of America; but prevails, with various modifications, in most of the continental states of Europe, and in the Isle of Man, Jersey, Guernsey, St. Lucia, Trinidad, Ceylon, and the Mauritius; at the Cape of Good Hope; in the southern states of America, Lower Canada, Demerara, and Berbice.]

Legitimacy.

& B. 127. As to proof of legitimacy of children born in wedlock, see *Shelley* v. ——, 13 Ves. 58: *Head* v. *Head*, 1 Sim. & St. 150; Turn. & R. 138: *Banbury & Gardner Peerage case*, rep. by Le Marchant; and 1 Sim. & St. 153: *Gibbs* v. *Hooper*, 2 Myl. & K. 353: *Bury* v. *Philpot*, Id. 549: *Rex* v. *Luffe*, 8 East, 193: *Goodright* d. *Tompson* v. *Saul*, 4 T. R. 356: *Morris* v. *Davies*, 3 Car. & P. 215, 437; 5 Cl. & Fin. 163: *Cope* v. *Cope*, 5 Car. & P. 604: Sir H. Nicholas on Adulterine Bastardy. As to what doubts in respect of legitimacy are fatal to a title, see *Lord Braybroke* v. *Inskip*, 8 Ves. 417: and see *Smith* v. *Death*, 5 Mad. 371; 6 Id. 57.]

[A husband has a sufficiently strong interest in his wife's legitimacy to make evidence of his declaration upon the subject admissible towards proof of the fact. *Vowles* v. *Young*, 13 Ves. 140. Declarations of the parents themselves after the birth are, for an obvious reason, of little weight. *Sherborne* v. *Napier*, 2 Ridg. P. C. 234. The fact of illegitimacy is often mentioned in the registry of baptism; but such records are not entitled to much weight. See *May* v. *May*, 2 Str. 1073; Peake Ev. 86. See further as to proof of legitimacy, *Slaney* v. *Wade*, 1 Myl. & Cr. 338.]

Parish registers.

[Parish registers prove only the time and place of baptism, marriage, and burial: statements contained in them as to the time or place of birth or the time of death, are not evidence of those facts. *Withen* v. *Law*, 3 Stark. 63: *Rex* v. *North Petherton*, 8 D. & Ry. 325; 5 B. & Cr. 508: *Burghart* v. *Angerstein*, 5 Car. & P. 690. The contents of a parish register may be proved by a verified extract. *Anon.* Lofft, 328: *Birt* v. *Barlow*, 1 Doug. 174. See *Walker* v. *Wingfield*, 18 Ves. 443: *Walker* v. *Lady Beauchamp*, 6 Car. & P. 552.]

Private registers.

[Private registers, such as the registers of dissenters of every kind, registers in an ambassador's chapel at home or in a chapel abroad, the Fleet books, and Guernsey registers, are not admissible. *Ex parte Taylor*, 1 Jac. & W. 483: *Whittuck* v. *Waters*, 4 Car. & P. 375: *Leader* v. *Barry*, 1 Esp. 353: *Read* v. *Passer*, Id. 213: *Lloyd* v. *Passingham*, 16 Ves. 59: *Doe* d. *Passingham* v. *Lloyd*, 1 Esp. 215; Peake, 231: *Doe* d. *Davies* v. *Gatacre*, 8 Car. & P. 578: *Huet* v. *Le Mesurier*, 1 Cox. 275. See *Lawrance* v. *Dixon*, Peake, 136. As to the localities and trustworthiness of various registers of this kind, which, though inadmissible as legal evidence, may be a useful source of information in practice, see the Parochial Registration Report, *passim*.]

Royal assent, 10th Aug. 1840.

[The stat. 3 & 4 Vict. c. 92, intituled "*An Act for enabling Courts of Justice to admit non-parochial Registers as Evidence of Births or*

EVIDENCE OF HEIRSHIP.

Registers of births, &c.

Baptisms, Deaths or Burials, and Marriages," after reciting a commission of the 13th September, 1836, " for inquiring into the state, custody, and authenticity of any registers or records of births or baptisms, deaths or burials, and marriages lawfully solemnised, that had been kept in England and Wales, other than the parochial registers, and the copies thereof deposited with the diocesan registrars; and for inquiring whether any and what measures could be beneficially adopted for collecting and arranging and depositing such registers or records, and for considering and advising the proper measures to be adopted for giving full force and effect as evidence in all courts of justice to all such registers as were found accurate and faithful, and for facilitating the production and reception of the same;" and that there are now about seven thousand registers in the

Certain registers to be deposited in the custody of the registrar-general

custody of the said commissioners, enacts, sect. 1, " That the registrar-general of births, deaths, and marriages in England shall receive, and deposit in the general register office, all the registers and records of births, baptisms, deaths, burials, and marriages now in the custody of the commissioners appointed by her Majesty as aforesaid, and which they have by their said report recommended to be kept in some secure place of deposit, and also the several registers and records mentioned in the schedules (H.), (I.), (P.) and (Q.), annexed to the said report of the said commissioners, and also such other registers as are hereinafter directed to be deposited with him:

Proviso as to registers not received.

Provided that none of the said registers or records not already in the custody of the said commissioners shall be received by the registrar-general, unless the person or persons now having the custody thereof shall, within three calendar months from the passing of this act, send the same to the said commissioners for examination by them."

Continuance of commissioners for 12 months. Their duty.

Sect. 2 continues the authority of the commissioners for twelve months, and authorises them to inquire into the authenticity, &c. of every register or record of birth, baptism, naming, dedication, death, burial, and marriage, which shall be sent to them within three months from the passing of the act, and such as they shall certify under the hands and seals of three or more of them (of whom the registrar-general shall not be one) as fit to be placed with the other registers and records hereby directed to be deposited in the said office, shall be received by the registrar-general, upon order of one of the principal secretaries of state, and deposited with the rest.

Sect. 3 contains declaratory provisions as to the general register office.

Commissioners

Sect. 4. The commissioners from time to time to deliver to the registrar-general descriptive lists of all the above-mentioned registers

and records, containing such particulars, and referring to the registers and records in such manner, as in the opinion of the registrar-general shall be sufficient to identify every such register and record; and three or more of the commissioners (of whom the registrar-general shall not be one) to authenticate every separate book or volume, by writing upon it under their hands; and where certain parts only of such registers or records appear to them to be original or authentic, the descriptive lists, and the certificate upon such book or volume, to contain a reference to those parts.

to identify the registers deposited.

Sect. 5. Lists to be made by registrar-general which shall be open to search, and certified extracts had therefrom. The fee for each extract 2*s.* 6*d.*

Sect. 6. "That all registers and records deposited in the General Register Office by virtue of this act, (except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May Fair, at the Mint in Southwark, and elsewhere), which were deposited in the registry of the Bishop of London in the year 1821, as hereinafter mentioned, shall be deemed to be in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions hereinafter contained; and the registrar-general shall produce or cause to be produced any such register or record, on subpœna or order of any competent court or tribunal, and on payment of a reasonable sum, to be taxed as the court shall direct, and to be paid to the registrar-general, on account of the loss of time of the officer by whom such register or record shall be produced, and to enable the registrar-general to defray the travelling and other expenses of such officer."

Registers deemed in legal custody, and shall be receivable in evidence.

Sect. 7. Fees to be accounted for.

Sect. 8. Wilful injury or forgery of registers, felony.

Sect. 9. All extracts from the registers or records to be sealed or stamped with the seal of the office; and all extracts purporting to be stamped with the seal of the said office shall be received in evidence in all civil cases, instead of the production of the original registers or records containing such entries, subject nevertheless to the provisions hereinafter contained.

Extracts from registers to be stamped with the seal of office.

Sect. 10. Every extract shall describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited in the General Register Office under this act; and the production of any of the said registers or records from the General Register Office, in the custody of the proper officer thereof, or the production of any such certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the

Extracts to describe the register whence taken.

Production of register shall be sufficient.

EVIDENCE OF HEIRSHIP.

said office, shall be sufficient to prove that such register or record is one of the registers and records deposited in the General Register Office under this act, in all cases in which the register or record, or any certified extract therefrom, is herein respectively declared admissible in evidence.

Certified extracts may be used in Courts of law and sessions, upon notice given.

Sect. 11. "That in case any party shall intend to use in evidence, on the trial of any cause in any of the courts of common law, or on the hearing of any matter which is not a criminal case at any session of the peace in England or Wales, any extract, certified as hereinbefore mentioned, from any such register or record, he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract, and of the certificate thereof; and on proof by affidavit of the service or on admission of the receipt of such notice and copy, such certified extract shall be received in evidence at such trial or hearing, if the Judge or Court shall be of opinion that such service has been made in sufficient time before such trial or hearing, to have enabled the opposite party to inspect the original register or record from which such certified extract had been taken, or within such time as shall be directed by any rule to be made as hereinafter provided."

Sect. 12. If the original be used, notice and copy must nevertheless be given and delivered.

Certified extracts may be used in evidence on examination of witnesses, or at the hearing of the cause in Courts of equity, upon notice.

Sect. 13. "That in case any party shall intend to use in evidence on any examination of witnesses, or at the hearing of any cause in any court of equity, any extract, certified as hereinbefore mentioned, he shall, ten clear days at the least before publication shall pass in any cause where no commission has issued for the examination of the witnesses of the party intending to give such evidence, or where such commission shall issue, then seven clear days at the least before the opening of such commission, deliver to the clerk or clerks in court of the opposite party or parties a notice in writing of his intention to use such certified extract in evidence on the examination of witnesses or at the hearing of the cause (as the case may be), and shall at the same time deliver to the clerk or clerks in court of the opposite party or parties a copy or copies of such extract, and of the certificate thereof, and thereupon such certificated extract shall be received in evidence; provided that at the hearing of the cause the service of such certified copy and notice be admitted or proved by affidavit."

Sect. 14. If the original be used, notice and copy must nevertheless be given and delivered.

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Sect. 15. "That in case any party shall intend to use in evidence, upon any petition, motion, or other interlocutory proceedings in any court of equity or in the Master's office, any extract, certified as hereinbefore mentioned, he shall produce to the court or Master (as the case may be) an extract, certified as hereinbefore mentioned, accompanied by an affidavit stating the deponent's belief that the entry or entries in the original register or record is correct and genuine."

Certified extracts to be used in interlocutory proceedings, and in the Master's office.

Sect. 16. "That in case any party shall intend to use in evidence in any ecclesiastical court, or in the High Court of Admiralty, any extract, certified as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from a parish register, save and except that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record: Provided always, that the judge of the court, on cause shewn by any party to the suit (or of his own motion when the proceedings are in *pœnam*), may, after publication, issue a monition for the production at the hearing of the cause of the original register or record containing the entry to which such certified extract relates."

Certified extracts to be used in Ecclesiastical Courts;

and the Judge may order the production of the original.

Sect. 17. "That in all criminal cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the court the original register or record."

In criminal cases the originals to be produced.

Sects. 18 and 19. Rules, to regulate the practice as to the admission of registers, the costs, &c., to be made by judges of the several courts.

Sect. 20. "That the several registers and records of baptisms and marriages performed at the Fleet and King's Bench prisons, at May Fair, and at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in the year 1821, by the authority of one of his late Majesty's principal secretaries of state, shall be transferred from the said registry to the custody of the registrar-general, who is hereby directed to receive the same for safe custody: Provided nevertheless, that none of the provisions hereinbefore contained respecting the registers and records made receivable in evidence by virtue of this act shall extend to the registers and records so deposited in the registry of the Bishop of London in the year 1821 as aforesaid."]

Fleet and May Fair registers, &c.

[As to defects and irregularities in parochial registers, see *Walker* v. *Wingfield*, 18 Ves. 443: *Doe* d. *Warren* v. *Bray*, 3 Man. & Ry.

Defective and irregular entries in registers.

EVIDENCE OF HEIRSHIP.

Registry of births, &c.

428; 8 B. & Cr. 813; *May* v. *May*, 2 Str. 1073: *Lee* v. *Meecock*, 5 Esp. 177. It is scarcely necessary to refer the reader to the stat. 6 & 7 Will. 4, c. 86, providing for the registering of births, marriages, and deaths in England. Indexes are kept at the offices of the superintendent registrars, and also at the registrar-general's office; and by sect. 38, it is enacted, that all certified copies of entries, purporting to be sealed or stamped with the seal of the General Register Office, shall be used as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry and certified copy, purporting to be given in the said office, shall be of any force or effect, unless so sealed or stamped. The registry of birth, under the above act, is evidence of the time of the birth; and it is provided, that births shall not be registered after six months (s. 23).]

[The registry must, of course, in all cases, be connected with the party by evidence of identity. See *Best* v. *Barlow*, Doug. 170; 12 Vin. Ab. *Evid.*, A. b. 15, pl. 11; T. b. 69, pl. 3: *Draycott* v. *Talbot*, 2 Br. P. C. 92. Handwriting may, it seems, be resorted to for the purpose. See *Mortimer* v. *M'Calln*, Exch. H. T. 1840; 4 Jur. 172.]

Evidence of marriage.

[The fact of a marriage may be proved by the evidence of parties present, and even by the presumptive evidence of general reputation, without having recourse to the register. *Allison's case*, 1 R. & R. 109: *Morris* v. *Miller*, 1 Blackst. 632: *Evans* v. *Morgan*, 2 Cr. & J. 453; see Doug. 172: *Gordon* v. *Gordon*, 3 Swanst. 400. The chief danger attending presumptive evidence of marriage is, that such evidence may be rebutted by either of the parties. *Goodright* d. *Stephens* v. *Moss*, Cowp. 531: *Rex* v. *Bramley*, 6 T. R. 330. After the deaths of both parties, such evidence may be safely relied on. A marriage has been presumed from the husband's impaling the wife's arms with his own on his plate, &c.; *Hervey* v. *Hervey*, 2 W. Bl. 899; from letters between the parties, Ib.; from their children being described in parish registers, as their legitimate offspring, Ib.; *Lord Braybroke* v. *Inskip*, 8 Ves. 417; from fines, levied for the purpose of barring the wife's dower; *Hervey* v. *Hervey*: *Cook* v. *Lloyd*, Peake, Ev. xxviii. (5th ed.); from the elopement of the parties, and their return as man and wife, Ib. As to what evidence of this kind should satisfy a purchaser, see *Lord Braybroke* v. *Inskip*, 8 Ves. 417.]

Proof of acts of Parliament.

[*Proof of Written Documents—Acts of Parliament.*]—[The original Acts of Parliament are kept at the Parliament Office, both public and private; the latter being filed and labelled for reference.

The public acts are enrolled, and the greater part of the rolls are kept at the Rolls' Chapel, the rest are at the Tower of London, and some few at the Chapter-house; but it has not for a long time been the practice to enrol private acts. (See the Introduction to the Statutes, published by the Record Commissioners, p. xxxv.) All public acts are presumed to be known to the Judges, who refer to the printed copies only for the purpose of refreshing their memories. But a greater weight is by implication given to these copies, by the stat. 41 Geo. 3, c. 90, s. 9, which enacts, that the copy of the statutes of the kingdom of *England* and of *Great Britain* since the Union printed and published by the printer duly authorised to print and publish the same, shall be received as conclusive evidence of those statutes, in any Court in *Ireland*, and in like manner the printed statutes of Ireland, prior to the Union, are made evidence in courts in Great Britain.]

Private acts.

[Private acts of Parliament are proved by a copy, examined with the original. But, in modern acts, a clause is usually inserted, declaring that the act shall be deemed and taken to be a public act, and shall be taken notice of as such by all Judges, &c. This dispenses with the necessity of examining the copy by the Parliament roll, or of proving that the copy purporting to have been printed by the King's printer, was so printed. *Beaumont* v. *Mountain*, 4 Moo. & Sc. 177. The clause formerly used in private acts, declaring a copy printed by the King's printer to be evidence, has been held to dispense with proof that the copy was actually so printed. Phill. Evid. 611; but see *Woodward* v. *Coffin*, 1 Cr., M. & R. 48. Clauses in a private act, which are of public concern, (as clauses relating to highways, &c.), are judicially noticed in the same manner as clauses in a public act. *Rex* v. *Utterby*, Phill. Evid. 610.]

Error in printed copy.

[Where there is any descrepancy between the printed copy and the Parliament roll, the latter is preferred. 1 Str. 446. The divisions into sections in the printed copy, made for convenience of reference, are not to be regarded in the construction. 3 B. & Cr. 71.]

Matters of record.

Other Matters of Record.]—[A record is proved in Court by a copy under seal, which is either an exemplification or an *inspeximus*, (See Vin. Ab. *Ev.* A. b. 25, 33, 44), or by an examined or an office copy; which latter, in any other cause or court than that to which the record belongs, must be proved to have been examined with the original. See *Slane Peerage*, 5 Cl. & Fin. 23. But office copies made by an officer in pursuance of a duty imposed on him by the law, as chirographs of fines, &c., are evidence, without more; but

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where the duty of the officer is merely to enrol and permit inspection, his copy of the document is not admissible any more than another copy, unless proved to have been examined. Phil. Ev. 615. An ancient document, produced from the proper custody, and importing to be an exemplification, but which then had not the Great Seal affixed, was presumed to be an exemplification, and admitted in evidence. *Mayor, &c. of Beverley* v. *Craven*, 2 M. & Rob. 140.]

[Where the document itself is not enrolled, the conveyancer of course requires it to be produced; and the certificate on it by the proper officer is sufficient proof of the fact of enrolment; *Kinnersley* v. *Orpe*, Doug. 56; and of the date, if that is stated. *Garrick* v. *Williams*, 3 Taunt. 540: *Rex* v. *Hopper*, 3 Price, 495. And the person, whose name appears on the certificate, is presumed to be the proper officer. *Doe* d. *Williams* v. *Lloyd*, 1 Scott, N. R. 503.]

[And as the original is the proper evidence, and the deposit of it will amount to an equitable mortgage, a purchaser will not be satisfied with an examined copy of a bargain and sale, (although by the 10 Anne, c. 18, s. 8, such copy is made evidence), unless the absence of the original is accounted for. An examined copy of any deed required by law to be enrolled, appears to be good evidence of the contents of that deed, independently of the provisions of the 10 Anne, c. 18; but where the enrolment is not required by law such copy is only evidence against the party upon whose acknowledgment the enrolment was made. Bull. N. P. 256; 3 Camp. 20. The statute 8 Geo. 2, c. 6, s. 22, establishing a registry of deeds in the North Riding of Yorkshire, makes attested copies of the enrolments of deeds, &c., enrolled at length, evidence in case of the destruction of the originals.]

[Enrolment cannot be presumed, unless a chasm appears in the rolls, at the period when the enrolment should have taken place. *Doe* d. *Howson* v. *Waketon*, 3 B. & Al. 149: *Wright* v. *Smithies*, 10 East, 409. See 1 Jac. & W. 619: *Doe* d. *Griffin* v. *Mason*, 3 Camp. 7: *Doe* v. *Warwick Canal Co.*, 2 Scott, 717. The vendor must furnish attested copies of instruments on record.]

Fines and recoveries.

Fines and Recoveries.]—[Recoveries are proved like other records (*a*). A fine is proved by the chirograph: 2 Stark. N. P. 13;

(*a*) [The stat. 3 & 4 Will. 4, c. 74, s. 13, enacts, "That after the 31st day of December, 1833, the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said Court of Common Pleas shall from time to time order or direct;

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or by an exemplification, or a copy examined with the record. The authority of the chirographer does not extend to make proclamations; and these, therefore, in strictness, should be proved by comparison with the roll. 3 Taunt. 166; 6 Id. 486.]

Non-enrolment of recoveries. Stat. 14 Geo. 2, c. 20, s. 4.

[Recoveries were sometimes not entered on record. The stat. 14 Geo. 2, c. 20, s. 4, authorises purchasers for value of hereditaments, whereof a recovery or recoveries is, are, or were necessary to be suffered in order to complete the title, and those claiming under them, (having been in possession from the time of the purchase), to produce in evidence after the end of twenty years from the time of the purchase, the deed or deeds making a tenant to the writ of entry, and declaring the uses of a recovery or recoveries; which shall in all courts of law and equity be taken as evidence, that such recovery or recoveries was or were duly suffered and perfected according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record; provided that the person or persons making such deed or deeds, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs, and to suffer such recovery or recoveries.]

Where the Court will amend parcels in a fine.

[Where the parcels of a fine or recovery were inaccurate or defective, the Court was in the habit of correcting or supplying them

and the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's justices of assize for the county palatine of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the Court of Pleas of the county palatine of Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said Court of Pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed; and while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made and extracts and copies obtained as heretofore, and on paying the accustomed fees; and when any of the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made and extracts or copies obtained at such times and on paying such fees as shall from time to time be ordered by the court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed."]

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by the deed declaring the uses, on affidavit. 2 Bos. & Pull. 578, 580, n.; 6 Taunt. 489; 4 J. B. Moore, 170; 8 Ib. 163, 334; but see 2 New Rep. 480. As to the affidavit requisite, see 2 Taunt. 1; 6 Ib. 432; 7 Ib. 697; 6 J. B. Moore, 250. But if the lands were omitted or totally misdescribed in the deed, the mistake was irremediable; 3 Bos. & Pull. 362; 2 Taunt. 96; 6 Ib. 145; though a misdescription, which did not render the identity of the lands doubtful was not material. 5 Taunt. 207; 6 J. B. Moore, 520; but see 7 Taunt. 177; 8 J. B. Moore, 520. As to where the deed was lost, see 7 Taunt. 79. As to correcting the misnomer of parties, see 2 Bl. 816; 2 Bos. & Pull. 455; but see 3 J. B. Moore, 241; 8 Ib. 449. Any person who had an adverse interest could be heard against the amendment. 7 Taunt. 352. The stat. 3 & 4 Will. 4, c. 74, enacts,—

Stat. 3 and 4 Will. 4, c. 74—Fines made valid without amendment.

Sect. 7. "That if it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission." (*a*).

Recoveries made valid without amendment.

Sect. 8. "That, if it shall be apparent from the deed, making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as

(*a*) [This clause excludes the jurisdiction of the Court in matters of amendment, where the error is apparent. *Lockington* dem. *Shipley et ux.* con. 1 Scott, 263. Where the error appears by affidavit the Court will amend. *Totton* dem. *Vincent* def., 5 Bing. N. C. 626.]

it would have done if there had been no such error, misdescription, or omission."

Saving jurisdiction in cases not provided for.

Sect. 9. Provides, "That nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act." (*a*).

Recoveries made valid in certain cases where bargain and sale is not duly enrolled.

Sect. 10. "That no common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to enrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery: Provided such recovery would have been valid if the bargain and sale, purporting to make the tenant to the writ, had been duly enrolled."

Recoveries invalid in consequence of there not being proper tenants to the writs of entry, made valid in certain cases.

Sect. 11. "That no common recovery already suffered or hereafter to be suffered shall be invalid, in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery: Provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved." (*b*).

Certain cases in which fines and recoveries shall not be made valid by this act.

Sect. 12. Provides, "That, where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act, so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery, if valid, shall, before the passing of this act, have had any dealings with the lands comprised in such

(*a*) [See *Re Twisden's recov.* 5 Scott, 638: *Lamont.* vouch. 3 Ib. 666.]

(*b*) [See *In re Debary*, 5 Simons, 283.]

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fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party."

Fines and recoveries of lands in ancient demesne levied or suffered in the manor Court, after other fines and recoveries in a superior Court, shall be as valid as if the tenure had not been changed.

Sect. 5. "That, if at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior Court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the Court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior Court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's Court, then and in every such case the fine or common recovery levied or suffered in the lord's Court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior Court, be as good, valid, and binding, as the same would have been if the tenure had not been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered, in a Court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such Court, and such Court

Fines and recoveries shall not be invalid in other cases, though levied or suffered in Courts whose jurisdictions may not extend

shall be deemed a Court of sufficient jurisdiction for all the purposes of such fine or recovery: and, in every other case where persons shall have assumed to hold Courts in which fines or common recoveries have been levied or suffered, and such Courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorised Courts shall not be invalid in consequence of their having been levied or suffered therein, and such Courts shall be deemed Courts of sufficient jurisdiction for all the purposes of such fines or recoveries."]

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to the lands therein comprised.

[Where the first and third proclamations of a fine, levied at the Carmarthen Great Sessions in 1830, had been omitted to be entered, and it appeared that they had been made, the Court amended the fine, by indorsing those proclamations. *Lloyd* d. *Nicholas*, Def., 4 Bing. N. C. 633.]

Omission to enter proclamations.

Title under Assignees in Insolvency.]—[By the stat. 1 & 2 Vict. c. 110, s. 46, a copy of any vesting order, or of the appointment of a permanent assignee or assignees of the insolvent's estate and effects, "such copy being made upon parchment, and purporting to have the certificate of the provisional assignee of the said Court, or his deputy appointed for that purpose indorsed thereon, and to be sealed with the seal of the said Court, shall in all courts and places, and without further proof, be recognised and received as sufficient evidence of such order and appointment respectively having been made, and of the title of the provisional assignee, and of such other assignee or assignees respectively, under the same: Provided that where, according to any laws now in force, any conveyance or assignment of any real or personal property of an insolvent debtor would be required to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, Court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to her Majesty, then and in every such case such certified copy as hereinbefore is described of such order under this act, vesting the estate and effects of any prisoner in the provisional assignee of the said Insolvent Debtors' Court, and a like certified copy of the appointment of an assignee or assignees under this act (if any such appointment shall have been made), shall be registered in the registry office, Court, or place wherein such conveyance or assignment as last aforesaid would require to be registered, enrolled, or recorded; and the registry hereby directed shall have the like effect, to all intents and purposes, as the

Proceedings in insolvency.—Certified copy of order and appointment to be evidence.

Proviso for registry.

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registry, enrolment, or recording of such conveyance or assignment, as last aforesaid would have had; and the title of any purchaser of any such property as last aforesaid for valuable consideration, without notice of any such order or appointment as aforesaid, who shall have duly registered, enrolled, or recorded his purchase-deed previously to the registry hereby directed, shall not be invalidated by reason of such order as aforesaid, or the appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon respectively, unless a certified copy of such orders and a certified copy of such appointment, if any, shall be registered as aforesaid within the times following; that is to say, as regards the United Kingdom of Great Britain and Ireland, within two months after the date of such order and appointment respectively, and as regards all other places within twelve months from the date thereof respectively." See *Delafield* v. *Freeman*, 3 M & Pay. 704: *Jones* v. *Nicholls*, Id. 12: *Northam* v. *Latouche*, Id. 647: *Doe* d. *Ellis* v. *Hardy*, 2 Nev. & P. 402: *Doe* d. *Broughton* v. *Storey*, 3 N. & P. 106.]

Evidence of removal and appointment of new assignees.

Sect. 65, authorising the Court to remove assignees and appoint new assignees, enacts, "That every such removal and appointment shall be entered of record in the said Court, and such notice thereof shall be published as the said Court shall at any time direct: and proof of such removal and appointment so entered of record as aforesaid shall be received by such certified copy thereof as is hereinbefore directed to be received as proof of such order and appointment."

A copy of such proceedings under seal to be admitted as evidence.

Sect. 105 enacts, "That a copy of such petition, vesting order, schedule, order of adjudication, and other orders and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other proceeding, and purporting to be sealed with the seal of the said Court, shall at all times be admitted in all courts and places whatever as sufficient evidence of the same, without any other proof whatever given of the same." See *Nicholls* v. *Downes*, 4 Car. & P. 330.

The facts to be shewn upon a title by a purchaser from an insolvent's assignees are, that notice of the meeting of creditors for approving the mode of sale was advertised in the London Gazette and another newspaper, fourteen days before the sale; that the signing and approving creditors were the major part in value present; that the meeting was held thirty days before the sale; and that the sale was made within six months from the appointment of the permanent assignee, or by order of the insolvent court. *Vide ante*, pp. 97, 117.]

[As to proceedings in bankruptcy, *vide ante*, pp. 95, 112.]

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Administration.

Administration.]—[When the letters of administration are not forthcoming, the title of an administrator may be proved by an examined copy of the act-book of the Spiritual Court, in which the original minutes of the decision of the Court are contained. *Davis* v. *Williams*, 13 East, 232; 1 Sim. 5. See *Elden* v. *Keddel*, 8 East, 187; 16 Id. 200; Bull. N. P. 246. A certificate from the Ecclesiastical Court that administration was granted is also evidence in favour of a third person. *Kempton* v. *Cross*, Cas. temp. Hard. 108.]

Courts in which administration should be taken out and wills proved.

[Administration must be taken out and wills proved in the Court of the ordinary, in whose jurisdiction the assets are situate. Where th ereare *bona notabilia* (*i. e.* goods of the value of £5), in more than one diocese in the same province, the jurisdiction of the ordinary in each diocese is excluded, and the administration or probate belongs to the Prerogative Court, unless the dispersion of the assets was caused by the death of the party while on a journey. *Doe* d. *Allen* v. *Ovens*, 2 B. & Ad. 423. If there are assets in both provinces, administration or probate must be taken out in each, either in an inferior or in the Prerogative Court, according to the circumstances of the assets in such province. Where a canal runs through both provinces, the will of a shareholder is sufficiently proved in the Prerogative Court of the province in which the company's business offices are situate. *Smith* v. *Stafford*, 2 Wils. C. C. 166. See *Ex parte Horne*, 2 B. & Cr. 632. The locality of specialty debts is determined by that of the record or deed evidencing them; that of simple contract debts, by that of the debtor; 1 Salk. 40; 3 Id. 164; Carth. 149; 2 Selw. N. P. 764; British stock is within the province of Canterbury; *Rex* v. *Capper*, 7 Price, 217; *Gurney* v. *Rawlins*, 2 Mee. & W. 87; French *rentes* and American stock are not within the jurisdiction of the English Courts. *Att.-Gen.* v. *Dimond*, 1 Cr. & J. 356; *Att.-Gen.* v. *Hope*, 1 Cr. M. & R. 530; 8 Bligh, 44. But Russian, Danish, Dutch, and other foreign bonds and securities that pass by delivery, are *bona notabilia* in the place where they are situate. See *Att.-Gen.* v. *Bouwens*, 4 Mee. & W. 171. A prerogative administration is necessary to obtain payment of money out of the Court of Chancery, however small the amount. *Challner* v. *Marshall*, 6 Ves. 118: *Newman* v. *Hodgson*, 7 Id. 409: *Thomas* v. *Davies*, 12 Id. 417. See *Young* v. *Elworthy*, 1 Myl. & K. 215: *Huthwaite* v. *Phaire*, 1 Scott, N. R. 43.]

[Peculiar jurisdictions stand in the same situation as dioceses; but where goods are within a peculiar appertaining to the diocese

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of the archbishop, and also elsewhere, there must be a separate probate or administration for each district. *Price* v. *Simpson*, Cr. El. 718. A grant by a bishop to an archdeacon, of full power to prove the wills of all persons deceased within the archdeaconry, gives the archdeacon full episcopal authority as to such wills; and, therefore, probate by the archdeacon is good, though there are *bona notabilia* out of the archdeaconry, but within the diocese. *Rex* v. *Yonge*, 5 Mau. & S. 119. A grant of probate or administration by the Prerogative Court, though not authorised, unless there are *bona notabilia* in two dioceses or peculiars, is good until repealed, and the acts of the administrator in the mean time are valid. *Prince's case*, 5 Co. 29: *Lysons* v. *Barrow*, 2 Scott, 721; 2 Bing. N. R. 486.]

[See further, *infra*, tit. ADMINISTRATION.]

Wills.

Wills.]—[The proper evidence of a will bequeathing chattels real and other personal property is the probate, bearing the seal of the Ecclesiastical Court. *Pinney* v. *Pinney*, 2 Man. & Ry. 436; 8 B. & Cr. 335: *Allen* v. *Dundas*, 3 T. R. 125. Where the probate is lost, the proper evidence is an exemplification from the Court by which it was granted; Bull. N. P. 246; 1 Str. 412; but an examined copy of the probate, though not of the will itself, is, it seems, admissible to prove an executor's title; Phill. Ev. 645; and the probate act-book of the Court may be resorted to for the same purpose, without accounting for the non-production of the probate. *Cox* v. *Allingham*, Jac. 514: *Doe* d. *Edwards* v. *Gunning*, 2 Nev. & P. 260. Revocation of a probate may be proved by the Assignation Book, at the Prerogative Court. *Rex* v. *Ramsbottom*, 1 Leach, Cr. C. 25, n.]

[The probate of a will is not admissible at all to prove any part of its contents that relate to real property, either of freehold or copyhold tenure,—not even as secondary evidence,—where the will itself is lost. *Doe* d. *Ash* v. *Calvert*, 2 Camp. 389: *Jervoice* v. *Duke of Northumberland*, 1 J. & W. 570: *Hume* v. *Rundell*, 6 Madd. 331: *Doe* d. *Wild* v. *Omerod*, 1 M. & Rob. 466. The ledger book of the Ecclesiastical Court, however, being a record which the Court has authority to make, is admissible on the principle already mentioned; and an examined copy of the entry in the ledger book will be received upon a question of title to real estate, either to prove title under the will, or relationship where a pedigree is in question. Bull. N. P. 246. Conveyancers, however, in all ordinary cases, are satisfied with the probate, in proof of a title to real estate. In important matters, the copy should be examined with the original will, which can only be done by paying for or producing an office copy. These copies are frequently inaccurate.]

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Where a purchaser from devisees is entitled to the concurrence of the heir-at-law, or to have the will proved *per testes*.

[J.If the memorandum of attestation of a will of real estate, (made before the operation of the recent act), does not state that the will was attested by the three witnesses in the testator's presence, (or, in cases with the new act, that it was attested by the two witnesses, in the presence of the testator, and in the joint presence of each other,) though his statement is not essential to the validity of the will; yet it seems to be the better opinion, that the purchaser would be entitled to insist on the concurrence of the heir, or that the will should be proved *per testes*. And it is thought by some gentlemen, that, even where the attestation is informal, it cannot be supported, if an affidavit by the witnesses that they subscribed the will in the testator's presence, is produced. Covent. Convey. Evid. 27. Sometimes an unproved will is in the hands of a third person. In such a case, the purchaser is entitled to have it proved in the Ecclesiastical Court, or deposited with one of the Masters of the Court of Chancery, for safe custody; and the circumstance, that the heir-at-law has joined in the conveyance, does not negative this right; for it might happen, that a devise had been made by the testator, in favour of some other party; and, therefore, without seeing what the will contained, it would be impossible to say whether the vendors had a good title to the premises. *Coppard* v. *Harrison*, 2 Cox, 320. It does not appear in this case, that a covenant for the production of the will had been offered. If a purchaser were entitled to reject such a covenant, it would not be on the ground that the probate of it in the Ecclesiastical Court gives to the will additional value, as evidence of title relating to the real estate (which clearly it does not). Indeed, if the will relate to real estate only, that Court has no jurisdiction over it; but where it embraces personalty, as wills commonly do, it ought to be proved there; and hence it is, that the Court is the general repository of wills, both of real and personal estate.J.]

[Where the will has been proved in a Court not having jurisdiction for the purpose for which it is used, an assignment made by the executor will be rendered available in evidence by a probate, subsequently obtained in the proper Court. *Rogers* v. *James*, 7 Taunt. 147; 2 Marsh. 425.]

Deeds, &c.

Deeds, and other Private Documents.]—[The practice of conveyancers with respect to the admission of documents proceeds upon the assumption that forgery has not been attempted. The proof of execution and handwriting is therefore dispensed with. But it is always necessary to see that the document has come from the pro-

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per custody. The well-known rule of law is, that every attested instrument must be proved by the attesting witness, if alive, unless thirty years have elapsed from the time of its execution. Phil. Ev. 640. But if the instrument bears any material erasure or interlineation, or does not appear to have come from the proper custody, it should be proved, although thirty years old. Id. As to proving the seal of a corporation, *vide infra*, Vol. 4, p. 65.]

Loss of deeds.

[The vendor must produce the original deeds, or explain the absence of them. Verified copies merely are inadmissible, unless the originals are lost. See *Harvey* v. *Phillips*, 2 Atk. 541: *Southby* v. *Hutt*, 2 Myl. & Cr. 207: *Bryant* v. *Busk*, 4 Russ. 1: *Skeffington* v. *Whitehurst*, 3 You. & C. 1. In the latter case, an entry in a solicitor's bill of costs was considered to furnish evidence of the execution of a release. If a deed has its seals torn off, evidence may be given to shew that it was originally sealed. *Argoll* v. *Cheney*, Palm. 403; *Clerk* d. *Pryn* v. *Heath*, 2 Keb. 484, 556; 1 Sid. 426; 1 Mod. 11; *S. C.* nom., *Heath* v. *Pryn*, 1 Vent. 145; *Matthewson* v. *Lydiate*, Cro. El. 546; *Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 259; see 5 B. & C. 231: Gilb. Ev. 96, 6th ed. As to enrolled deeds, *vide ante*, p. 169.]

Livery of seisin.

[Livery of seisin may be presumed after twenty years' consistent possession. *Biden* v. *Loveday*, cit. 1 Vern. 169: *Rees* v. *Lloyd*, Wightw. 123. See *Jackson* v. *Jackson*, Sel. Ch. Ca. 81; and *infra* Vol. 4, p. 61.

Evidence of title to copyholds.

Copyholds.]—[The regular evidence of surrenders of, and admissions to, copyholds, are copies of Court rolls, signed by the steward and duly stamped; but the requisitions of the general Stamp Act do not prevent the use of the original rolls. *Doe* d. *Bennington* v. *Hall*, 16 East, 208: *Doe* d. *Garrow* v. *Otley*, Q. B., T. T., 1840, 4 Jurist, 1084. The copy of a deed of surrender out of Court is evidence, although the Stamp Act requires the original deed or memorandum of surrender to be stamped. *Doe* d. *Hawthorn* v. *Mee*, 1 Nev. & M. 424; 4 B. & Ad. 617. As to proving a surrender which has been omitted to be entered on the rolls, see *Doe* d. *Priestly* v. *Calloway*, 9 D. & Ry. 518; 6 B. & Cr. 484: *Rex* v. *Thruscross*, 3 Nev. & M. 284; 1 Ad. & E. 126. It seems a surrender may be presumed after long enjoyment; *Wilson* v. *Allen*, 1 Jac. & W. 611: *Lyford* v. *Coward*, 1 Vern. 195; and admission, in pursuance of a surrender which is proved, may, in like manner, be inferred after enjoyment, particularly when coupled with proof of payment of the customary rents, and performance of the customary services. *Blunt* v. *Clark*, 2 Sid. 61: *Fros-*

well v. *Welsh*, 3 Bulst. 214: *Rawlingson* v. *Grieves*, Id. 239; Walk. Copyh. 269, n. Acceptance of a surrender by the surrenderee, or an enfranchisement to him, is evidence of the same kind. 3 Bulst. 237: *Cooke* v. *Hellier*, 1 Ves. Sen. 234. As to the necessity of proving the steward's handwriting, see 1 Keb. 567, 720; Fortesc. 43; 1 Str. 654; 2 Atk. 44; Doug. 26; 6 M. & Sel. 38; 1 Jac. & W. 617.]

[By the late Insolvent Act, 1 & 2 Vict. c. 110, s. 47, where an insolvent's copyhold lands are sold, a certified copy of the vesting order, and a like copy of the appointment of the permanent assignee or assignees, are directed to be entered on the Court roll of the manor, and thereupon the assignee or assignees may surrender or convey the lands to any purchaser, as the Court shall direct.]

Evidence of custom.

Copyholds—Custom.]—[In practice, the certificate of the steward of the manor is generally considered to be sufficient evidence of the custom of such manor, as to descents, &c.; but in Court, the regular mode of proof is by the presentment of the homage, and evidence from the rolls of its having been followed in particular instances. *Doe* d. *Foster* v. *Sisson*, 12 East, 62. No inference can be drawn upon a trial, as to the existence of the custom in a particular manor, from the customs of adjacent manors. *Lowther* v. *Raw*, 2 B. P. C. 451: *Doe* d. *Breber* v. *Parker*, 5 T. R. 26: *Locke* v. *Coleman*, 1 Myl. & Cr. 430; but see *Dean and Chapter of Ely* v. *Warren*, 2 Atk. 189. The customary of a manor, which is usually make out by the steward, often from the presentment of the homage, but always expressed to be made *ex assensu omnium tenentium*, is admissible evidence; *Denn* d. *Goodwin* v. *Spray*, 1 T. R. 466; even without evidence of the custom having been followed in the particular point which it is produced to prove. *Roe* v. *Parker*; see *Ratcliffe* v. *Chaplin*, 4 Leon. 242. Evidence of reputation is also admissible. *Doe* d. *Foster* v. *Sisson*, 12 East, 62: *Locke* v. *Colman*, 1 Myl. & Cr. 430. The custom will not, in any case, be extended any further than it is strictly proved. Thus from evidence of a custom that the youngest son shall succeed, it will not be inferred to be the custom, that, in default of lineal heirs, the youngest brother, or the youngest cousin shall succeed. Id., *et ante*, p. 132. The same evidence cannot be used to prove a custom, that is relied upon to support a *prescription*, the two claims being obviously inconsistent. *Blewitt* v. *Tregoning*, 3 Ad. & El. 554.]

Evidence of identity.

Identity of Parcels.]—[The ordinary collateral sources of identification, where the descriptions of the parcels are unsatisfactory, are

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old plans, leases, books of deceased stewards, extracts from the land-tax, and parish assessment books; affidavits of old persons, &c. See *Parry* v. *Hindle*, 2 Taunt. 180: *Barry* v. *Bebbington*, 4 T.R. 514: *Doe* d. *Strode* v. *Seaton*, 2 Ad. & E. 171: *Pim* v. *Currel*, 6 Mee. & W. 234: *Evans* v. *Rees*, 10 Ad. & E. 150: *Wilkinson* v. *Allott*, 7 B. P. C. 518. As to the conclusiveness of a map drawn on the margin of a deed, see *Taylor* v. *Parry*, 1 Scott, N. C. 576.]

[J. There is no point in which titles are so generally defective as in evidence of identity. The early deeds frequently contain no other than a general description, or, which is still more unsatisfactory, the names and contents of fields specified in them are no longer applicable, and probably had ceased to be so long before they were disused, conveyances being usually prepared by persons who are not locally acquainted with the property, and who continue to convey the lands by the old description, without noticing the changes of names and boundaries, (which almost every estate gradually undergoes), until at length there is very little or no apparent connexion between the lands described and the lands intended to be conveyed. Recourse must then be had to parol evidence of identity, and how defective this evidence commonly is, every day's experience attests. The evil would in a great measure be prevented if, in preparing conveyances, care was taken to notice the alterations of this nature which have occurred since the last conveyance of the property (*a*). J.]

(*a*) [The use of maps or plans in the margin of deeds, according to the present practice, though a great help to the identification of parcels, and sufficient to prevent any ambiguity that might arise from mere changes of ownership and occupation, is not calculated to guard against the confusion caused by alterations in the physical condition of the surface itself. The most effectual method of quieting titles on the subject of identity and boundaries, would be by the use of authorised district maps on a large scale, prepared and kept by public officers in a manner resembling the system of registering maps, which has long been used with great benefit in Sweden (see the ordinance of Charles XI., 2nd R. P. R. App. 548), in Friesland, in Italy, and, I believe, in some other Continental States. But much may be done by the parties interested, even without legislative assistance, to secure this desirable end. The ordnance maps of the country, of which the greater part are already complete and published, afford a very obvious means of giving greater accuracy and permanence to the description of parcels. The plan in the conveyance should include one or more permanent and easily accessible points that are laid down in the ordnance map, (including, if possible, the extremity of some base upon which the trigonometrical survey was founded), and the bearings and distances of all the important and governing points in the boundaries of the parcels from these points, or from lines connecting them, should be stated in the description of the parcels. From these data the exact limits of the property could at any time be recovered, although all the original boundaries and all other evidence should be destroyed.]

EVIDENCE.

General description of copyholds on Court rolls held to be sufficient.

Identity of parcels.

[J. In a modern case, an objec tion to a title of copyholds, on account of the vagueness of the description on the Court rolls, and its alleged inadequacy to comprise the lands in question, was over-ruled. The Court rolls described the property as "one messuage and half-yard land, containing ten acres, two tofts of land, one messuage, and one yard-land; one cottage, with a garden, two acres of arable land and pasture, one croft and one close containing twenty-one acres, and one close containing twelve acres, and the rents of the Buddle of Chilcombe." The description in the contract for sale was, "all that capital messuage, tenement, or farm-house, barns, stables, cart-houses, sheds, out-buildings, farm-lands, hereditaments, and premises, situate at Moorsted, in the county of Southampton, as the same are now in the occupation of Bunny, as tenant of Walter Long, containing, by admeasurement, 219 acres, more or less." The purchaser, by computing the messuage and half-yard land at ten acres, the two tofts at two acres, the messuage and one-yard land at twenty acres, the cottage and garden, and two acres of arable land and pasture at two acres, the croft and one close at twenty-one acres, and the other close at twelve acres, attempted to make out that the description of the property on the Court rolls covered only sixty-seven acres, or, at most, by some variation in the calculation, seventy-one acres, and could not be made to apply to 219 acres, which were admitted to be, as stated in the contract, in the actual occupation of Bunny as tenant to the plaintiff, (the vendor).

On the part of the plaintiff, evidence was given, that the farm now occupied by Bunny, as tenant to the plaintiff, had passed through a succession of proprietors to the plaintiff by the description which now appeared on the Court rolls ; and, under such description, had been held by the occupiers for the time being for upwards of sixty years past.

The Master of the Rolls over-ruled the objection, observing, that the computation of quantity made by the defendant was, in a great degree, fanciful; that the generality and vagueness of descriptions on Court rolls were too well known to entitle such a computation to any weight; and that it was well established by the evidence in this case that the whole property now in the occupation of Bunny, as tenant, to the plaintiff, had actually passed and been enjoyed by the description contained in the Court rolls. *Long* v. *Collier*, 4 Russ. 267.J.]

[See the stat. 2 & 3 Will. 4, c. 80, intitled, "An Act for authorising the Identifying of Lands and other possessions of certain Ecclesiastical and Collegiate Corporations;" and, as to the powers of Commissioners of Inclosure to determine boundaries, see stat. 3 & 4 Vict. c. 31.]

EVIDENCE.

Stock in the funds.

Stock.]—[A transfer of stock may be proved by an examined copy of the transfer in the Bank books, the parties' handwriting being proved. *Mortimer* v. *M'Caln,* Exch. H. T. 1840; 4 Jurist, 172. When the conduct of a vendor of stock, held in trust under a will, had not been perfectly open and regular, the certificate of a stockbroker that there was then standing in the Bank books the sum of £3100 in the joint names of the three trustees of the will, was held insufficient. The fund was sold under a mortgage made after the testator's death. Lord *Langdale,* M. R., said, "It is impossible to rely on the certificate of a stockbroker, as the only evidence for the purpose of shewing that the stock is standing in the name of certain trustees. It is not easy to connect the £3000 Imperial stock stated in the deed (supposing the deed to be evidence that there was £3000 Imperial stock) with the stock standing in the name of the testator at the time of his death, and which it is alleged was subsequently converted into £3100 £3 per Cents. I think the purchaser was entitled to evidence of the identity of the stock, and also that it was subject to the trusts of the will; for on that the vendor's title depends." *Hobson* v. *Bell,* 2 Beav. 22.]

As to proving the adequacy of the purchase-money on the purchase of reversions.

Evidence of Title to a Reversion.]—[J. From the peculiar doctrine applied in equity to the sale of a reversion, and which appears to throw upon a person purchasing property of this nature the obligation of proving the fairness of the transaction, a doctrine which has been much and justly reprehended, it is always advisable, where the transaction of the purchase has not become unimpeachable by the acquiescence of the parties in whom the right to disturb it resides, to restrain the purchaser from requiring evidence that a fair price was given. In the case of *Boswell* v. *Mendham,* 6 Madd. 373, lands had been settled upon A. for life, with remainder to his wife for life, with remainder to his eldest son in tail. Upon the son attaining twenty-one, a recovery was suffered by the father, mother, and son, and the lands were resettled, subject to an annuity of £150 to the son for life, to such uses as A. and his wife should appoint; and, in default of appointment, to the use of A. for life, with remainder to his wife for life, with remainder to A. in fee: the consideration moving from the father to the son was stated to be the present annuity, and a debt owing from the son to the father of £250. A purchaser from A. required evidence of the existence of this debt and the fairness of the transaction, and the Vice-Chancellor, Sir *J. Leach,* justified the requisition.J.]

[J. In some instances the future interest is dependent on a contingency of such a nature as to be incapable of being the subject of

estimate or calculation, as that of the prior tenant for life (who in the case cited was a bachelor) not leaving issue; and then, from the want of data for ascertaining the true value, it is impossible efficiently to go into the inquiry as to the adequacy of the purchase-money; but where it appeared that the contract was originally made under the impression of the property sold being a vested reversionary interest, and in the subsequent progress of the treaty, half the purchase-money was agreed to be deducted on account of the contingency, the Court directed this principle to be adopted in the inquiry before the Master. *Baker* v. *Bent*, 1 Russ. & Myl. 224.[J.]]

Evidence of assent.

Assent of Executor.]—In transactions which took place at a remote period, the rule is, *ex diuturnitate temporis omnia præsumuntur solemniter esse acta;* Co. Litt. 6. a.; 2 Inst. 118, 362; and therefore a title depending either on an assignment by an executor, or by a legatee without any express evidence of an assent, is accepted without any difficulty. But in transactions of a recent date, the caution is generally adopted of having the concurrence of the legatee and the executor in the assignment; of the legatee, to obtain his admission that there has been no previous assent to the bequest, and that the term still remains in the executor; and of the executor, to pass the term in that character. When the assignment is from the legatee alone, it is particularly important to have some evidence of the executor's assent to the legacy; and in general, the consent of the executor, or other personal representative, is required to be testified by his concurrence in the deed of assignment, and by a confirmation thereof. To obviate the necessity of such concurrence, it is, as a point of practice, advisable that every legatee of a term for years should have an express assignment from the executor, or at least an instrument declaring his assent to the legacy. 3 Prest. Abst. 145.

Any expression or act which shews the executor's concurrence, or agreement, will amount to an assent.

But assent is only a perfecting act, for it is the will of the testator which gives the interest to the legatee, and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor which shews his concurrence or agreement to the thing bequeathed; will amount to an assent. 4 Bac. Abr. Gwill. ed. 444, *Legacies* (L.): *Noell* v. *Robinson*, 1 Vern. 94. For the executor's assent being analogous to a tenant's attornment to the grant of a reversion, a small matter will be construed an assent; Wentw. Off. Ex. 226: *Noell* v. *Robinson*, 2 Ventr. 358; and whatever verbal agreement will amount to an attornment, may constitute an assent to a legacy; Shep. Touchs. 456;

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Godolph. Orphan's Legacy, 144; Wentw. Off. Ex. 224. Expressions to the following effect have been adjudged to amount to an assent—"God send you joy of your bequest."—"I intend you to have your legacy according to the devise." Com. Dig. *Administration* (C. 6.) *Doe* d. *Sturges* v. *Tatchell*, 3 B. & Ad. 675. The executor's allowing the legatee of a term to receive the rents for a time only, or applying the rents for the devisee's maintenance during minority, when they were directed to be so applied by the will, has been considered an implied assent. *Colbourne* v. *Mixtone*, 1 Leon. 129: *Paramour* v. *Yardley*, Plowd. Com. 539; 1 Rop. Leg. 251, 2nd ed.

Before an assent or assignment can be given in evidence, probate must be obtained.

Although an executor may assent to a legacy or assign a term before probate; yet the assent or assignment cannot be given in evidence as an assent or assignment by the executor, without shewing letters of probate of the will, in proof of his being the executor: for the courts of law or of equity cannot receive a will in evidence in respect of personal estate, until it has been sanctioned by the Ecclesiastical Judge; and the letters of probate and the commission of administration are the only legal proofs of such sanction. Thus, till letters of probate are obtained, there is a good assent or assignment for all the purposes of title; but there is not any legal evidence to prove the right to make such assent or assignment. See 1 Cru. Dig. 264, s. 32. As soon as the will has been sanctioned by the Ecclesiastical Judge, then the defect of evidence is supplied, and there is a good title in point of fact and of law, and the relevant and proper evidence to support that fact. The doctrine that an executor may assign or release before probate, has frequently led to the conclusion, that a title would be good without obtaining letters of probate; (see Dyer, 367. a, (39)); and vendors have resisted the right of a purchaser to require the will should be proved. It seems clear beyond all doubt, that in transactions of a recent date, the purchaser is entitled to require that the will should be proved; but there are many cases in which a purchaser may forego his strict right without any risk to his title. The will may be proved at any time, and even after the death of an executor; and whenever the will shall be proved, the assent or assignment will be admissible in evidence and establish the deduction of the title from the executor. 3 Prest. Abst. 146. *Vide infra*, tit. ASSENT.

Presumption of assent.

[When a devisee of a term enters and remains in possession for a long time, (as four or five years), that is evidence of assent to the devise, on the part of the executors; and where the devisee had quitted possession shortly after entering, it was left to the jury to determine whether that was of evidence of assent; and whether

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a contract by the devisee to grant an underlease was entered into in her own right, or as agent to the executors. *Richardson* v. *Gifford*, 3 Nev. & M. 325. Where a leasehold estate was devised to A., and the administrator with the will annexed paid the rent for six years, and charged it to A., it was held, in ejectment by A., to be sufficient evidence of the administrator's assent. *Doe* d. *Maberley* v. *Maberley*, 6 Car. & P. 126. But where a life interest in furniture was given to an executrix, her taking possession was held to be no assent to the bequest in remainder. *Richards* v. *Browne*, 4 Scott, 262. See also *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217; 2 Marsh. 505: *Foley* v. *Burnel*, 4 Br. P. C. 34. After the death of the executor, having paid the debts, his assent may be presumed, *Cray* v. *Willis*, 2 P. Wms. 531.]

Redemption of land-tax.

Land-tax.]—[Redemption of the land-tax is proved by the certificate of the Commissioners, with the receipt of the cashier of the Bank of England, and memorandum of registration. See 42 Geo. 3. c. 116, s. 38. As to the validity of sales by bodies corporate, for the purpose of redeeming the land-tax, see ss. 69, 76, and *Warner* v. *Potchett*, 3 B. & Ad. 921.]

TABLES.

REGNAL YEARS OF KINGS OF ENGLAND.

TABLE OF THE YEARS OF THE REIGNS OF THE ENGLISH SOVEREIGNS, WITH THE CORRESPONDING DATES ACCORDING TO THE CHRISTIAN ÆRA. (*a*)

WILLIAM THE CONQUEROR.

1	25 Dec. 1066 24 Dec. 1067	6	25 Dec. 1071 24 Dec. 1072	11	25 Dec. 1076 24 Dec. 1077	16	25 Dec. 1081 24 Dec. 1082
2	25 Dec. 1067 24 Dec. 1068	7	25 Dec. 1072 24 Dec. 1073	12	25 Dec. 1077 24 Dec. 1078	17	25 Dec. 1082 24 Dec. 1083
3	25 Dec. 1068 24 Dec. 1069	8	25 Dec. 1073 24 Dec. 1074	13	25 Dec. 1078 24 Dec. 1079	18	25 Dec. 1083 24 Dec. 1084
4	25 Dec. 1069 24 Dec. 1070	9	25 Dec. 1074 24 Dec. 1075	14	25 Dec. 1079 24 Dec. 1080	19	25 Dec. 1084 24 Dec. 1085
5	25 Dec. 1070 24 Dec. 1071	10	25 Dec. 1075 24 Dec. 1076	15	25 Dec. 1080 24 Dec. 1081	20	25 Dec. 1085 24 Dec. 1086

21 { 25 Dec. 1086
9 Sept. 1087

WILLIAM THE SECOND.

1	26 Sept. 1087 25 Sept. 1088	4	26 Sept. 1090 25 Sept. 1091	7	26 Sept. 1093 25 Sept. 1094	10	26 Sept. 1096 25 Sept. 1097
2	26 Sept. 1088 25 Sept. 1089	5	26 Sept. 1091 25 Sept. 1092	8	26 Sept. 1094 25 Sept. 1095	11	26 Sept. 1097 25 Sept. 1098
3	26 Sept. 1089 25 Sept. 1090	6	26 Sept. 1092 25 Sept. 1093	9	26 Sept. 1095 25 Sept. 1096	12	26 Sept. 1098 25 Sept. 1099

13 { 26 Sept. 1099
2 Aug. 1100

HENRY THE FIRST.

1	5 Aug. 1100 4 Aug. 1101	4	5 Aug. 1103 4 Aug. 1104	7	5 Aug. 1106 4 Aug. 1107	10	5 Aug. 1109 4 Aug. 1110
2	5 Aug. 1101 4 Aug. 1102	5	5 Aug. 1104 4 Aug. 1105	8	5 Aug. 1107 4 Aug. 1108	11	5 Aug. 1110 4 Aug. 1111
3	5 Aug. 1102 4 Aug. 1103	6	5 Aug. 1105 4 Aug. 1106	9	5 Aug. 1108 4 Aug. 1109	12	5 Aug. 1111 4 Aug. 1112

(*a*) [In the table contained in Sir Harris Nicolas's valuable work, the "Chronology of History," (from which, by permission of the Author and the Proprietors of the Cabinet Cyclopædia, the above is copied,) the years are reckoned according to the historical year, commencing with the 1st of January; figures are here added, shewing the style which was used in all documents prior to the 1st of January, 1753, and according to which the year commenced on the 25th of March. The earlier date is always, of course, the date old style.]

REGNAL YEARS OF KINGS OF ENGLAND.

13	5 Aug. 1112 – 4 Aug. 1113	19	5 Aug. 1118 – 4 Aug. 1119	25	5 Aug. 1124 – 4 Aug. 1125	31	5 Aug. 1130 – 4 Aug. 1131
14	5 Aug. 1113 – 4 Aug. 1114	20	5 Aug. 1119 – 4 Aug. 1120	26	5 Aug. 1125 – 4 Aug. 1126	32	5 Aug. 1131 – 4 Aug. 1132
15	5 Aug. 1114 – 4 Aug. 1115	21	5 Aug. 1120 – 4 Aug. 1121	27	5 Aug. 1126 – 4 Aug. 1127	33	5 Aug. 1132 – 4 Aug. 1133
16	5 Aug. 1115 – 4 Aug. 1116	22	5 Aug. 1121 – 4 Aug. 1122	28	5 Aug. 1127 – 4 Aug. 1128	34	5 Aug. 1133 – 4 Aug. 1134
17	5 Aug. 1116 – 4 Aug. 1117	23	5 Aug. 1122 – 4 Aug. 1123	29	5 Aug. 1128 – 4 Aug. 1129	35	5 Aug. 1134 – 4 Aug. 1135
18	5 Aug. 1117 – 4 Aug. 1118	24	5 Aug. 1123 – 4 Aug. 1124	30	5 Aug. 1129 – 4 Aug. 1130	36	5 Aug. 1135 – 1 Dec. 1135

STEPHEN.

1	26 Dec. 1135 – 25 Dec. 1136	5	26 Dec. 1139 – 25 Dec. 1140	9	26 Dec. 1143 – 25 Dec. 1144	13	26 Dec. 1147 – 25 Dec. 1148
2	26 Dec. 1136 – 25 Dec. 1137	6	26 Dec. 1140 – 25 Dec. 1141	10	26 Dec. 1144 – 25 Dec. 1145	14	26 Dec. 1148 – 25 Dec. 1149
3	26 Dec. 1137 – 25 Dec. 1138	7	26 Dec. 1141 – 25 Dec. 1142	11	26 Dec. 1145 – 25 Dec. 1146	15	26 Dec. 1149 – 25 Dec. 1150
4	26 Dec. 1138 – 25 Dec. 1139	8	26 Dec. 1142 – 25 Dec. 1143	12	26 Dec. 1146 – 25 Dec. 1147	16	26 Dec. 1150 – 25 Dec. 1151
17	26 Dec. 1151 – 25 Dec. 1152	18	26 Dec. 1152 – 25 Dec. 1153	19	26 Dec. 1153 – 25 Oct. 1154		

HENRY THE SECOND.

1	19 Dec. 1154 – 18 Dec. 1155	9	19 Dec. 1162 – 18 Dec. 1163	17	19 Dec. 1170 – 18 Dec. 1171	25	19 Dec. 1178 – 18 Dec. 1179
2	19 Dec. 1155 – 18 Dec. 1156	10	19 Dec. 1163 – 18 Dec. 1164	18	19 Dec. 1171 – 18 Dec. 1172	26	19 Dec. 1179 – 18 Dec. 1180
3	19 Dec. 1156 – 18 Dec. 1157	11	19 Dec. 1164 – 18 Dec. 1165	19	19 Dec. 1172 – 18 Dec. 1173	27	19 Dec. 1180 – 18 Dec. 1181
4	19 Dec. 1157 – 18 Dec. 1158	12	19 Dec. 1165 – 18 Dec. 1166	20	19 Dec. 1173 – 18 Dec. 1174	28	19 Dec. 1181 – 18 Dec. 1182
5	19 Dec. 1158 – 18 Dec. 1159	13	19 Dec. 1166 – 18 Dec. 1167	21	19 Dec. 1174 – 18 Dec. 1175	29	19 Dec. 1182 – 18 Dec. 1183
6	19 Dec. 1159 – 18 Dec. 1160	14	19 Dec. 1167 – 18 Dec. 1168	22	19 Dec. 1175 – 18 Dec. 1176	30	19 Dec. 1183 – 18 Dec. 1184
7	19 Dec. 1160 – 18 Dec. 1161	15	19 Dec. 1168 – 18 Dec. 1169	23	19 Dec. 1176 – 18 Dec. 1177	31	19 Dec. 1184 – 18 Dec. 1185
8	19 Dec. 1161 – 18 Dec. 1162	16	19 Dec. 1169 – 18 Dec. 1170	24	19 Dec. 1177 – 18 Dec. 1178	32	19 Dec. 1185 – 18 Dec. 1186
33	19 Dec. 1186 – 18 Dec. 1187	34	19 Dec. 1187 – 18 Dec. 1188	35	19 Dec. 1188 – 6 July 1189		

RICHARD THE FIRST.

1	3 Sept. 1189 – 2 Sept. 1190	3	3 Sept. 1191 – 2 Sept. 1192	5	3 Sept. 1193 – 2 Sept. 1194	7	3 Sept. 1195 – 2 Sept. 1196
2	3 Sept. 1190 – 2 Sept. 1191	4	3 Sept. 1192 – 2 Sept. 1193	6	3 Sept. 1194 – 2 Sept. 1195	8	3 Sept. 1196 – 2 Sept. 1197
9	3 Sept. 1197 – 2 Sept. 1198	10	3 Sept. 1198 – 6 April 1199				

REGNAL YEARS OF KINGS OF ENGLAND.

JOHN. (a)

1	27 May 1199 17 May 1200	5	15 May 1203 2 June 1204	9	31 May 1207 14 May 1208	13	12 May 1211 2 May 1212
2	18 May 1200 2 May 1201	6	3 June 1204 18 May 1205	10	15 May 1208 6 May 1209	14	3 May 1212 22 May 1213
3	3 May 1201 22 May 1202	7	19 May 1205 10 May 1206	11	7 May 1209 26 May 1210	15	23 May 1213 7 May 1214
4	23 May 1202 14 May 1203	8	11 May 1206 30 May 1207	12	27 May 1210 11 May 1211	16	8 May 1214 27 May 1215
		17	28 May 1215 18 May 1216	18	19 May 1216 19 Oct. 1216		

HENRY THE THIRD.

1	28 Oct. 1216 27 Oct. 1217	15	28 Oct. 1230 27 Oct. 1231	29	28 Oct. 1244 27 Oct. 1245	43	28 Oct. 1258 27 Oct. 1259
2	28 Oct. 1217 27 Oct. 1218	16	28 Oct. 1231 27 Oct. 1232	30	28 Oct. 1245 27 Oct. 1246	44	28 Oct. 1259 27 Oct. 1260
3	28 Oct. 1218 27 Oct. 1219	17	28 Oct. 1232 27 Oct. 1233	31	28 Oct. 1246 27 Oct. 1247	45	28 Oct. 1260 27 Oct. 1261
4	28 Oct. 1219 27 Oct. 1220	18	28 Oct. 1233 27 Oct. 1234	32	28 Oct. 1247 27 Oct. 1248	46	28 Oct. 1261 27 Oct. 1262
5	28 Oct. 1220 27 Oct. 1221	19	28 Oct. 1234 27 Oct. 1235	33	28 Oct. 1248 27 Oct. 1249	47	28 Oct. 1262 27 Oct. 1263
6	28 Oct. 1221 27 Oct. 1222	20	28 Oct. 1235 27 Oct. 1236	34	28 Oct. 1249 27 Oct. 1250	48	28 Oct. 1263 27 Oct. 1264
7	28 Oct. 1222 27 Oct. 1223	21	28 Oct. 1236 27 Oct. 1237	35	28 Oct. 1250 27 Oct. 1251	49	28 Oct. 1264 27 Oct. 1265
8	28 Oct. 1223 27 Oct. 1224	22	28 Oct. 1237 27 Oct. 1238	36	28 Oct. 1251 27 Oct. 1252	50	28 Oct. 1265 27 Oct. 1266
9	28 Oct. 1224 27 Oct. 1225	23	28 Oct. 1238 27 Oct. 1239	37	28 Oct. 1252 27 Oct. 1253	51	28 Oct. 1266 27 Oct. 1267
10	28 Oct. 1225 27 Oct. 1226	24	28 Oct. 1239 27 Oct. 1240	38	28 Oct. 1253 27 Oct. 1254	52	28 Oct. 1267 27 Oct. 1268
11	28 Oct. 1226 27 Oct. 1227	25	28 Oct. 1240 27 Oct. 1241	39	28 Oct. 1254 27 Oct. 1255	53	28 Oct. 1268 27 Oct. 1269
12	28 Oct. 1227 27 Oct. 1228	26	28 Oct. 1241 27 Oct. 1242	40	28 Oct. 1255 27 Oct. 1256	54	28 Oct. 1269 27 Oct. 1270
13	28 Oct. 1228 27 Oct. 1229	27	28 Oct. 1242 27 Oct. 1243	41	28 Oct. 1256 27 Oct. 1257	55	28 Oct. 1270 27 Oct. 1271
14	28 Oct. 1229 27 Oct. 1230	28	28 Oct. 1243 27 Oct. 1244	42	28 Oct. 1257 27 Oct. 1258	56	28 Oct. 1271 27 Oct. 1272
						57	28 Oct. 1272 16 Nov. 1272

(a) [In the 3rd, 5th, 8th, 11th, 14th, and 16th years of John, several days of the month of May, in two succeeding years of our Lord, occurred in the *same* year of that King's reign; thus:—

Anno 3	Ascension Day	1201 (3 May),	to Ascension Day	1201 (22 May).
5	—	1203 (15 May),	—	1204 (2 June).
8	—	1206 (11 May),	—	1207 (30 May).
11	—	1209 (7 May),	—	1210 (26 May).
14	—	1212 (3 May),	—	1213 (22 May).
16	—	1214 (8 May),	—	1215 (27 May).

Consequently every day from the 4th to the 22nd of May, 1201, and from the 4th to the 22nd of May, 1202, both inclusive, occurred in the *first* year of King John, and no document dated from the 4th to the 22nd of May, 1 John, can be assigned with certainty to the right year of our Lord; and with respect to certain days in the other years above-mentioned.]

EDWARD THE FIRST. (a)

1	20 Nov. 1272 20 Nov. 1273	9	20 Nov. 1280 20 Nov. 1281	17	20 Nov. 1288 20 Nov. 1289	25	20 Nov. 1296 20 Nov. 1297
2	20 Nov. 1273 20 Nov. 1274	10	20 Nov. 1281 20 Nov. 1282	18	20 Nov. 1289 20 Nov. 1290	26	20 Nov. 1297 20 Nov. 1298
3	20 Nov. 1274 20 Nov. 1275	11	20 Nov. 1282 20 Nov. 1283	19	20 Nov. 1290 20 Nov. 1291	27	20 Nov. 1298 20 Nov. 1299
4	20 Nov. 1275 20 Nov. 1276	12	20 Nov. 1283 20 Nov. 1284	20	20 Nov. 1291 20 Nov. 1292	28	20 Nov. 1299 20 Nov. 1300
5	20 Nov. 1276 20 Nov. 1277	13	20 Nov. 1284 20 Nov. 1285	21	20 Nov. 1292 20 Nov. 1293	29	20 Nov. 1300 20 Nov. 1301
6	20 Nov. 1277 20 Nov. 1278	14	20 Nov. 1285 20 Nov. 1286	22	20 Nov. 1293 20 Nov. 1294	30	20 Nov. 1301 20 Nov. 1302
7	20 Nov. 1278 20 Nov. 1279	15	20 Nov. 1286 20 Nov. 1287	23	20 Nov. 1294 20 Nov. 1295	31	20 Nov. 1302 20 Nov. 1303
8	20 Nov. 1279 20 Nov. 1280	16	20 Nov. 1287 20 Nov. 1288	24	20 Nov. 1295 20 Nov. 1296	32	20 Nov. 1303 20 Nov. 1304
33	20 Nov. 1304 20 Nov. 1305	34	20 Nov. 1305 20 Nov. 1306	35	20 Nov. 1306 7 July 1307		

EDWARD THE SECOND.

1	8 July 1307 7 July 1308	6	8 July 1312 7 July 1313	11	8 July 1317 7 July 1318	16	8 July 1322 7 July 1323
2	8 July 1308 7 July 1309	7	8 July 1313 7 July 1314	12	8 July 1318 7 July 1319	17	8 July 1323 7 July 1324
3	8 July 1309 7 July 1310	8	8 July 1314 7 July 1315	13	8 July 1319 7 July 1320	18	8 July 1324 7 July 1325
4	8 July 1310 7 July 1311	9	8 July 1315 7 July 1316	14	8 July 1320 7 July 1321	19	8 July 1325 7 July 1326
5	8 July 1311 7 July 1312	10	8 July 1316 7 July 1317	15	8 July 1321 7 July 1322	20	8 July 1326 20Jan.1326–7

EDWARD THE THIRD.

1	25 Jan. 1326–7 24 Jan. 1327–8	6	25 Jan. 1331–2 24 Jan. 1332–3	11	25 Jan. 1336–7 24 Jan. 1337–8
2	25 Jan. 1327–8 24 Jan. 1328–9	7	25 Jan. 1332–3 24 Jan. 1333–4	12	25 Jan. 1337–8 24 Jan. 1338–9
3	25 Jan. 1328–9 24 Jan. 1329–30	8	25 Jan. 1333–4 24 Jan. 1334–5	13	25 Jan. 1338–9 24 Jan. 1339–40
4	25 Jan. 1329–30 24 Jan. 1330–1	9	25 Jan. 1334–5 24 Jan. 1335–6	14	25 Jan. 1339–40 24 Jan. 1340–1
5	25 Jan. 1330–1 24 Jan. 1331–2	10	25 Jan. 1335–6 24 Jan. 1336–7	15	25 Jan. 1340–1 24 Jan. 1341–2

(a) [This King, in some public and private documents, is called Edw. IV., account being taken of the Saxon Kings of that name. Henry III. died on the 16th of November, 1272, and was buried on the 20th, when his son Edward, then abroad, was proclaimed King. It is a peculiarity of this reign, that, in computing the years, fractions of a day were admitted, contrary to the maxim "that the law doth reject all fractions and divisions of a day, for the uncertainty which is always the mother of confusion and contention." 5 Rep. 2. Thus, the surrender of the Scottish Crown by Baliol, in the early part of the 20th November, 1292, was said to have taken place at the end of the 20th Edward I., while proceedings later in the same day were said to have happened "*anno regni ipsius domini nostri Edwardi vicesimo finiente et vicesimo primo incipiente.*" Nicolas, 312.]

REGNAL YEARS OF KINGS OF ENGLAND.

EDWARD THE THIRD (*continued*).

16	25 Jan. 1341–2 24 Jan. 1342–3	28	25 Jan. 1353–4 24 Jan. 1354–5	40	25 Jan. 1365–6 24 Jan. 1366–7
17	25 Jan. 1342–3 24 Jan. 1343–4	29	25 Jan. 1354–5 24 Jan. 1355–6	41	25 Jan. 1366–7 24 Jan. 1367–8
18	25 Jan. 1343–4 24 Jan. 1344–5	30	25 Jan. 1355–6 24 Jan. 1356–7	42	25 Jan. 1367–8 24 Jan. 1368–9
19	25 Jan. 1344–5 24 Jan. 1345–6	31	25 Jan. 1356–7 24 Jan. 1357–8	43	25 Jan. 1368–9 11 June 1368–9 24 Jan. 1369–70
20	25 Jan. 1345–6 24 Jan. 1346–7	32	25 Jan. 1357–8 24 Jan. 1358–9	44	25 Jan. 1369–70 24 Jan. 1370–1
21	25 Jan. 1346–7 24 Jan. 1347–8	33	25 Jan. 1358–9 24 Jan. 1359–60	45	25 Jan. 1370–1 24 Jan. 1371–2
22	25 Jan. 1347–8 24 Jan. 1348–9	34	25 Jan. 1359–60 8 May 1359–60 24 Jan. 1360–1	46	25 Jan. 1371–2 24 Jan. 1372–3
23	25 Jan. 1348–9 24 Jan. 1349–50	35	25 Jan. 1360–1 24 Jan. 1361–2	47	25 Jan. 1372–3 24 Jan. 1373–4
24	25 Jan. 1349–50 24 Jan. 1350–1	36	25 Jan. 1361–2 24 Jan. 1362–3	48	25 Jan. 1373–4 24 Jan. 1374–5
25	25 Jan. 1350–1 24 Jan. 1351–2	37	25 Jan. 1362–3 24 Jan. 1363–4	49	25 Jan. 1374–5 24 Jan. 1375–6
26	25 Jan. 1351–2 24 Jan. 1352–3	38	25 Jan. 1363–4 24 Jan. 1364–5	50	25 Jan. 1375–6 24 Jan. 1376–7
27	25 Jan. 1352–3 24 Jan. 1353–4	39	25 Jan. 1364–5 24 Jan. 1365–6	51	25 Jan. 1376–7 21 June 1377

RICHARD THE SECOND.

1	22 June 1377 21 June 1378	6	22 June 1382 21 June 1383	11	22 June 1387 21 June 1388	16	22 June 1392 21 June 1393
2	22 June 1378 21 June 1379	7	22 June 1383 21 June 1384	12	22 June 1388 21 June 1389	17	22 June 1393 21 June 1394
3	22 June 1379 21 June 1380	8	22 June 1384 21 June 1385	13	22 June 1389 21 June 1390	18	22 June 1394 21 June 1395
4	22 June 1380 21 June 1381	9	22 June 1385 21 June 1386	14	22 June 1390 21 June 1391	19	22 June 1395 21 June 1396
5	22 June 1381 21 June 1382	10	22 June 1386 21 June 1387	15	22 June 1391 21 June 1392	20	22 June 1396 21 June 1397
21	22 June 1397 21 June 1398	22	22 June 1398 21 June 1399	23	22 June 1399 29 Sept. 1399		

HENRY THE FOURTH.

1	30 Sept. 1399 29 Sept. 1400	4	30 Sept. 1402 29 Sept. 1403	7	30 Sept. 1405 29 Sept. 1406	10	30 Sept. 1408 29 Sept. 1409
2	30 Sept. 1400 29 Sept. 1401	5	30 Sept. 1403 29 Sept. 1404	8	30 Sept. 1406 29 Sept. 1407	11	30 Sept. 1409 29 Sept. 1410
3	30 Sept. 1401 29 Sept. 1402	6	30 Sept. 1404 29 Sept. 1405	9	30 Sept. 1407 29 Sept. 1408	12	30 Sept. 1410 29 Sept. 1411
13	30 Sept. 1411 29 Sept. 1412	14	30 Sept. 1412 20 Mar. 1412–13				

HENRY THE FIFTH.

1	21 Mar. 1412–13 20 Mar. 1413–14	4	21 Mar. 1415–16 20 Mar. 1416–17	7	21 Mar. 1418–19 20 Mar. 1419–20
2	21 Mar. 1413–14 20 Mar. 1414–15	5	21 Mar. 1416–17 20 Mar. 1417–18	8	21 Mar. 1419–20 20 Mar. 1420–1
3	21 Mar. 1414–15 20 Mar. 1415–16	6	21 Mar. 1417–18 20 Mar. 1418–19	9	21 Mar. 1420–1 20 Mar. 1421–2
10	21 Mar. 1421–2 31 Aug. 1422				

REGNAL YEARS OF KINGS OF ENGLAND.

HENRY THE SIXTH.

1 1 Sept. 1422 – 31 Aug. 1423	10 1 Sept. 1431 – 31 Aug. 1432	19 1 Sept. 1440 – 31 Aug. 1441	28 1 Sept. 1449 – 31 Aug. 1450
2 1 Sept. 1423 – 31 Aug. 1424	11 1 Sept. 1432 – 31 Aug. 1433	20 1 Sept. 1441 – 31 Aug. 1442	29 1 Sept. 1450 – 31 Aug. 1451
3 1 Sept. 1424 – 31 Aug. 1425	12 1 Sept. 1433 – 31 Aug. 1434	21 1 Sept. 1442 – 31 Aug. 1443	30 1 Sept. 1451 – 31 Aug. 1452
4 1 Sept. 1425 – 31 Aug. 1426	13 1 Sept. 1434 – 31 Aug. 1435	22 1 Sept. 1443 – 31 Aug. 1444	31 1 Sept. 1452 – 31 Aug. 1453
5 1 Sept. 1426 – 31 Aug. 1427	14 1 Sept. 1435 – 31 Aug. 1436	23 1 Sept. 1444 – 31 Aug. 1445	32 1 Sept. 1453 – 31 Aug. 1454
6 1 Sept. 1427 – 31 Aug. 1428	15 1 Sept. 1436 – 31 Aug. 1437	24 1 Sept. 1445 – 31 Aug. 1446	33 1 Sept. 1454 – 31 Aug. 1455
7 1 Sept. 1428 – 31 Aug. 1429	16 1 Sept. 1437 – 31 Aug. 1438	25 1 Sept. 1446 – 31 Aug. 1447	34 1 Sept. 1455 – 31 Aug. 1456
8 1 Sept. 1429 – 31 Aug. 1430	17 1 Sept. 1438 – 31 Aug. 1439	26 1 Sept. 1447 – 31 Aug. 1448	35 1 Sept. 1456 – 31 Aug. 1457
9 1 Sept. 1430 – 31 Aug. 1431	18 1 Sept. 1439 – 31 Aug. 1440	27 1 Sept. 1448 – 31 Aug. 1449	36 1 Sept. 1457 – 31 Aug. 1458

37 1 Sept. 1458 – 31 Aug. 1459 | 38 1 Sept. 1459 – 31 Aug. 1460 | 39 1 Sept. 1460 – 1 Mar. 1460–1

"Anno ab Inchoatione regni nostri, 49 (9 October 1470 – About April 1472) et Readeptionis nostræ regiæ potestatis," 1*

EDWARD THE FOURTH.

1 4 Mar. 1460–1 – 3 Mar. 1461–2	8 4 Mar. 1467–8 – 3 Mar. 1468–9	15 4 Mar. 1474–5 – 3 Mar. 1475–6	
2 4 Mar. 1461–2 – 3 Mar. 1462–3	9 4 Mar. 1468–9 – 3 Mar. 1469–70	16 4 Mar. 1475–6 – 3 Mar. 1476–7	
3 4 Mar. 1462–3 – 3 Mar. 1463–4	10 4 Mar. 1469–70 – 3 Mar. 1470–1	17 4 Mar. 1476–7 – 3 Mar. 1477–8	
4 4 Mar. 1463–4 – 3 Mar. 1464–5	11 4 Mar. 1470–1 – 3 Mar. 1471–2	18 4 Mar. 1477–8 – 3 Mar. 1478–9	
5 4 Mar. 1464–5 – 3 Mar. 1465–6	12 4 Mar. 1471–2 – 3 Mar. 1472–3	19 4 Mar. 1478–9 – 3 Mar. 1479–80	
6 4 Mar. 1465–6 – 3 Mar. 1466–7	13 4 Mar. 1472–3 – 3 Mar. 1473–4	20 4 Mar. 1479–80 – 3 Mar. 1480–1	
7 4 Mar. 1466–7 – 3 Mar. 1467–8	14 4 Mar. 1473–4 – 3 Mar. 1474–5	21 4 Mar. 1480–1 – 3 Mar. 1481–2	

22 4 Mar. 1481–2 – 3 Mar. 1482–3 | 23 4 Mar. 1482–3 – 9 Apr. 1483

EDWARD THE FIFTH.

1 9 April 1483 – 25 June 1483

RICHARD THE THIRD.

1 26 June 1483 – 25 June 1484 | 2 26 June 1484 – 25 June 1485 | 3 26 June 1485 – 22 Aug. 1485

* Henry was deposed on March 4, 1461, by Edward IV., and in October, 1470, recovered the throne.

REGNAL YEARS OF KINGS OF ENGLAND.

HENRY THE SEVENTH.

1 { 22 Aug. 1485 / 21 Aug. 1486	7 { 22 Aug. 1491 / 21 Aug. 1492	13 { 22 Aug. 1497 / 21 Aug. 1498	19 { 22 Aug. 1503 / 21 Aug. 1504
2 { 22 Aug. 1486 / 21 Aug. 1487	8 { 22 Aug. 1492 / 21 Aug. 1493	14 { 22 Aug. 1498 / 21 Aug. 1499	20 { 22 Aug. 1504 / 21 Aug. 1505
3 { 22 Aug. 1487 / 21 Aug. 1488	9 { 22 Aug. 1493 / 21 Aug. 1494	15 { 22 Aug. 1499 / 21 Aug. 1500	21 { 22 Aug, 1505 / 21 Aug. 1506
4 { 22 Aug. 1488 / 21 Aug. 1489	10 { 22 Aug. 1494 / 21 Aug. 1495	16 { 22 Aug. 1500 / 21 Aug. 1501	22 { 22 Aug. 1506 / 21 Aug. 1507
5 { 22 Aug. 1489 / 21 Aug. 1490	11 { 22 Aug. 1495 / 21 Aug. 1496	17 { 22 Aug. 1501 / 21 Aug. 1502	23 { 22 Aug. 1507 / 21 Aug. 1508
6 { 22 Aug. 1490 / 21 Aug. 1491	12 { 22 Aug. 1496 / 21 Aug. 1497	18 { 22 Aug. 1502 / 21 Aug. 1503	24 { 22 Aug. 1508 / 21 Apr. 1509

HENRY THE EIGHTH.

1 { 22 Apr. 1509 / 21 Apr. 1510	10 { 22 Apr. 1518 / 21 Apr. 1519	19 { 22 Apr. 1527 / 21 Apr. 1528	28 { 22 Apr. 1536 / 21 Apr. 1537
2 { 22 Apr. 1510 / 21 Apr. 1511	11 { 22 Apr. 1519 / 21 Apr. 1520	20 { 22 Apr. 1528 / 21 Apr. 1529	29 { 22 Apr. 1537 / 21 Apr. 1538
3 { 22 Apr. 1511 / 21 Apr. 1512	12 { 22 Apr. 1520 / 21 Apr. 1521	21 { 22 Apr. 1529 / 21 Apr. 1530	30 { 22 Apr. 1538 / 21 Apr. 1539
4 { 22 Apr. 1512 / 21 Apr. 1513	13 { 22 Apr. 1521 / 21 Apr. 1522	22 { 22 Apr. 1530 / 21 Apr. 1531	31 { 22 Apr. 1539 / 21 Apr. 1540
5 { 22 Apr. 1513 / 21 Apr. 1514	14 { 22 Apr. 1523 / 21 Apr. 1524	23 { 22 Apr. 1531 / 21 Apr. 1532	32 { 22 Apr. 1540 / 21 Apr. 1541
6 { 22 Apr. 1514 / 21 Apr. 1515	15 { 22 Apr. 1523 / 21 Apr. 1524	24 { 22 Apr. 1532 / 21 Apr. 1533	33 { 22 Apr. 1541 / 21 Apr. 1542
7 { 22 Apr. 1515 / 21 Apr. 1516	16 { 22 Apr, 1524 / 21 Apr. 1525	25 { 22 Apr. 1533 / 21 Apr. 1534	34 { 22 Apr. 1542 / 21 Apr. 1543
8 { 22 Apr. 1516 / 21 Apr. 1517	17 { 22 Apr. 1525 / 21 Apr. 1526	26 { 22 Apr. 1534 / 21 Apr. 1535	35 { 22 Apr. 1543 / 21 Apr. 1544
9 { 22 Apr. 1517 / 21 Apr. 1518	18 { 22 Apr. 1526 / 21 Apr. 1527	27 { 22 Apr. 1535 / 21 Apr. 1536	36 { 22 Apr. 1544 / 21 Apr. 1545

37 { 22 Apr. 1545 / 21 Apr. 1546 | 38 { 22 Apr. 1546 / 21 Jan. 1546–7

EDWARD THE SIXTH.

1 { 28 Jan. 1546–7 / 27 Jan. 1547–8	3 { 28 Jan. 1548–9 / 27 Jan. 1549–50	5 { 28 Jan. 1550–1 / 27 Jan. 1551–2
2 { 28 Jan. 1547–8 / 27 Jan. 1548–9	4 { 28 Jan. 1549–50 / 27 Jan. 1550–1	6 { 28 Jan. 1551–2 / 27 Jan. 1552–3

7 { 28 Jan. 1552–3 / 6 July, 1553

JANE.(a)

1 { 6 July 1553 / 17 July 1553

MARY.

1 { 6 July 1553 / 5 July 1554 | 2 { 6 July 1554 / 24 July 1554

(a) [A single deed, and several public documents are extant, dated in the "1st year of the reign of Jane, Queen of England." Nicolas, 334.]

PHILIP AND MARY.

AFTER HER MARRIAGE WITH KING PHILIP, 25TH JULY, 1554.

1 & 2	25 July 1554 – 24 July 1555	3 & 4	25 July 1556 – 24 July 1557	5 & 6	25 July 1558 – 17 Nov. 1558
2 & 3	25 July 1555 – 24 July 1556	4 & 5	25 July 1557 – 24 July 1558		

The days in each year between the 6th and 24th July, (both included), after the Queen's marriage, were, however, thus reckoned :—

1 & 3—July 6 to 24—1555 | 3 & 5—July 6 to 24—1557
2 & 3—July 6 to 24—1556 | 4 & 5—July 6 to 24—1558

ELIZABETH.

1	17 Nov. 1558 – 16 Nov. 1559	12	17 Nov. 1569 – 16 Nov. 1570	23	17 Nov. 1580 – 16 Nov. 1581	34	17 Nov. 1591 – 16 Nov. 1592
2	17 Nov. 1559 – 16 Nov. 1560	13	17 Nov. 1570 – 16 Nov. 1571	24	17 Nov. 1581 – 16 Nov. 1582	35	17 Nov. 1592 – 16 Nov. 1593
3	17 Nov. 1560 – 16 Nov. 1561	14	17 Nov. 1571 – 16 Nov. 1572	25	17 Nov. 1582 – 16 Nov. 1583	36	17 Nov. 1593 – 16 Nov. 1594
4	17 Nov. 1561 – 16 Nov. 1562	15	17 Nov. 1572 – 16 Nov. 1573	26	17 Nov. 1583 – 16 Nov. 1584	37	17 Nov. 1594 – 16 Nov. 1595
5	17 Nov. 1562 – 16 Nov. 1563	16	17 Nov. 1573 – 16 Nov. 1574	27	17 Nov. 1584 – 16 Nov. 1585	38	17 Nov. 1595 – 16 Nov. 1596
6	17 Nov. 1563 – 16 Nov. 1564	17	17 Nov. 1574 – 16 Nov. 1575	28	17 Nov. 1585 – 16 Nov. 1586	39	17 Nov. 1596 – 16 Nov. 1597
7	17 Nov. 1564 – 16 Nov. 1565	18	17 Nov. 1575 – 16 Nov. 1576	29	17 Nov. 1586 – 16 Nov. 1587	40	17 Nov. 1597 – 16 Nov. 1598
8	17 Nov. 1565 – 16 Nov. 1566	19	17 Nov. 1576 – 16 Nov. 1577	30	17 Nov. 1587 – 16 Nov. 1588	41	17 Nov. 1598 – 16 Nov. 1599
9	17 Nov. 1566 – 16 Nov. 1567	20	17 Nov. 1577 – 16 Nov. 1578	31	17 Nov. 1588 – 16 Nov. 1589	42	17 Nov. 1599 – 16 Nov. 1600
10	17 Nov. 1567 – 16 Nov. 1568	21	17 Nov. 1578 – 16 Nov. 1579	32	17 Nov. 1589 – 16 Nov. 1590	43	17 Nov. 1600 – 16 Nov. 1601
11	17 Nov. 1568 – 16 Nov. 1569	22	17 Nov. 1579 – 16 Nov. 1580	33	17 Nov. 1590 – 16 Nov. 1591	44	17 Nov. 1601 – 16 Nov. 1602

45 17 Nov. 1602 – 24 Mar. 1602–3

JAMES THE FIRST.

1	24 Mar. 1602–3 – 23 Mar. 1603–4	8	24 Mar. 1609–10 – 23 Mar. 1610–11	15	24 Mar. 1616–17 – 23 Mar. 1617–18
2	24 Mar. 1603–4 – 23 Mar. 1604–5	9	24 Mar. 1610–11 – 23 Mar. 1611–12	16	24 Mar. 1617–18 – 23 Mar. 1618–19
3	24 Mar. 1604–5 – 23 Mar. 1605–6	10	24 Mar. 1611–12 – 23 Mar. 1612–13	17	24 Mar. 1618–19 – 23 Mar. 1619–20
4	24 Mar. 1605–6 – 23 Mar. 1606–7	11	24 Mar. 1612–13 – 23 Mar. 1613–14	18	24 Mar. 1619–20 – 23 Mar. 1620–1
5	24 Mar. 1606–7 – 23 Mar. 1607–8	12	24 Mar. 1613–14 – 23 Mar. 1614–15	19	24 Mar. 1620–1 – 23 Mar. 1621–2
6	24 Mar. 1607–8 – 23 Mar. 1608–9	13	24 Mar. 1614–15 – 23 Mar. 1615–16	20	24 Mar. 1621–2 – 23 Mar. 1622–3
7	24 Mar. 1608–9 – 23 Mar. 1609–10	14	24 Mar. 1615–16 – 23 Mar. 1616–17	21	24 Mar. 1622–3 – 23 Mar. 1623–4

22 24 Mar. 1623–4 – 23 Mar. 1624–5 | 23 24 Mar. 1624–5 – 27 Mar. 1625

REGNAL YEARS OF KINGS OF ENGLAND.

CHARLES THE FIRST.

1	27 Mar. 1625 26 Mar. 1626	7	27 Mar. 1631 26 Mar. 1632	13	27 Mar. 1637 26 Mar. 1638	19	27 Mar. 1643 26 Mar. 1644
2	27 Mar. 1626 26 Mar. 1627	8	27 Mar. 1632 26 Mar. 1633	14	27 Mar. 1638 26 Mar. 1639	20	27 Mar. 1644 26 Mar. 1645
3	27 Mar. 1627 26 Mar. 1628	9	27 Mar. 1633 26 Mar. 1634	15	27 Mar. 1639 26 Mar. 1640	21	27 Mar. 1645 26 Mar. 1646
4	27 Mar. 1628 26 Mar. 1629	10	27 Mar. 1634 26 Mar. 1635	16	27 Mar. 1640 26 Mar. 1641	22	27 Mar. 1646 26 Mar. 1647
5	27 Mar. 1629 26 Mar. 1630	11	27 Mar. 1635 26 Mar. 1636	17	27 Mar. 1641 26 Mar. 1642	23	27 Mar. 1647 26 Mar. 1648
6	27 Mar. 1630 26 Mar. 1631	12	27 Mar. 1636 26 Mar. 1637	18	27 Mar. 1642 26 Mar. 1643	24	27 Mar. 1648 30 Jan. 1648–9

CHARLES THE SECOND.

COMMONWEALTH.

1	30 Jan. 1648–9 29 Jan. 1649–50	13	30 Jan. 1660–1 29 Jan. 1661–2	25	30 Jan. 1672–3 29 Jan. 1673–4		
2	30 Jan. 1649–50 29 Jan. 1650–1	14	30 Jan. 1661–2 29 Jan. 1662–3	26	30 Jan. 1673–4 29 Jan. 1674–5		
3	30 Jan. 1650–1 29 Jan. 1651–2	15	30 Jan. 1662–3 29 Jan. 1663–4	27	30 Jan. 1674–5 29 Jan. 1675–6		
4	30 Jan. 1651–2 29 Jan. 1652–3	16	30 Jan. 1663–4 29 Jan. 1664–5	28	30 Jan. 1675–6 29 Jan. 1676–7		
5	30 Jan. 1652–3 29 Jan. 1653–4	17	30 Jan. 1664–5 29 Jan. 1665–6	29	30 Jan. 1676–7 29 Jan. 1677–8		
6	30 Jan. 1653–4 29 Jan. 1654–5	18	30 Jan. 1665–6 29 Jan. 1666–7	30	30 Jan. 1677–8 29 Jan. 1678–9		
7	30 Jan. 1654–5 29 Jan. 1655–6	19	30 Jan. 1666–7 29 Jan. 1667–8	31	30 Jan. 1678–9 29 Jan. 1679–80		
8	30 Jan. 1655–6 29 Jan. 1656–7	20	30 Jan. 1667–8 29 Jan. 1668–9	32	30 Jan. 1679–80 29 Jan. 1680–1		
9	30 Jan. 1656–7 29 Jan. 1657–8	21	30 Jan. 1668–9 29 Jan. 1669–70	33	30 Jan. 1680–1 29 Jan. 1681–2		
10	30 Jan. 1657–8 29 Jan. 1658–9	22	30 Jan. 1669–70 29 Jan. 1670–1	34	30 Jan. 1681–2 29 Jan. 1682–3		
11	30 Jan. 1658–9 29 Jan. 1659–60	23	30 Jan. 1670–1 29 Jan. 1671–2	35	30 Jan. 1682–3 29 Jan. 1682–4		
12	30 Jan. 1659–60 29 *May* 1659–60(*f*) 29 Jan. 1660–1	24	30 Jan. 1671–2 29 Jan. 1672–3	36	30 Jan. 1683–4 29 Jan. 1684–5		
				37	30 Jan. 1684–5 6 Feb. 1685–6		

JAMES THE SECOND.

1	6 Feb. 1684–5 5 Feb. 1685–6	2	6 Feb. 1685–6 5 Feb. 1686–7	3	6 Feb. 1686–7 5 Feb. 1687–8		
				4	6 Feb. 1687–8 11 Dec. 1688		

WILLIAM AND MARY.

1	13 Feb. 1688–9 12 Feb. 1689–90	3	13 Feb. 1690–1 12 Feb. 1691–2	5	13 Feb. 1692–3 12 Feb. 1693–4		
2	13 Feb. 1689–90 12 Feb. 1690–1	4	13 Feb. 1691–2 12 Feb. 1692–3	6	13 Feb. 1693–4 27 Dec. 1694		

(*f*) [Oliver Cromwell assumed the title of Lord Protector on the 16th Dec. 1653. Richard Cromwell resigned the Protectorate on the 29th May, 1659.]

WILLIAM THE THIRD.

6 { 28 Dec. 1694 / 12 Feb. 1694–5	9 { 13 Feb. 1696–7 / 12 Feb. 1697–8	12 { 13 Feb. 1699–1700 / 12 Feb. 1700–1
7 { 13 Feb. 1694–5 / 12 Feb. 1695–6	10 { 13 Feb. 1697–8 / 12 Feb. 1698–9	13 { 13 Feb. 1700–1 / 12 Feb. 1701–2
8 { 13 Feb. 1695–6 / 12 Feb. 1696–7	11 { 13 Feb. 1698–9 / 12 Feb. 1699–1700	14 { 13 Feb. 1701–2 / 8 Mar. 1701–2

ANNE.

1 { 8 Mar. 1701–2 / 7 Mar. 1702–3	5 { 8 Mar. 1705–6 / 7 Mar. 1706–7	9 { 8 Mar. 1709–10 / 7 Mar. 1710–11
2 { 8 Mar. 1702–3 / 7 Mar. 1703–4	6 { 8 Mar. 1706–7 / 7 Mar. 1707–8	10 { 8 Mar. 1710–11 / 7 Mar. 1711–12
3 { 8 Mar. 1703–4 / 7 Mar. 1704–5	7 { 8 Mar. 1707–8 / 7 Mar. 1708–9	11 { 8 Mar. 1711–12 / 7 Mar. 1712–13
4 { 8 Mar. 1704–5 / 7 Mar. 1705–6	8 { 8 Mar. 1708–9 / 7 Mar. 1709–10	12 { 8 Mar. 1712–13 / 7 Mar. 1713–14

13 { 8 Mar. 1713–14 / 1 Aug. 1714

GEORGE THE FIRST.

1 { 1 Aug. 1714 / 31 July 1715	4 { 1 Aug. 1717 / 31 July 1718	7 { 1 Aug. 1720 / 31 July 1721	10 { 1 Aug. 1723 / 31 July 1724
2 { 1 Aug. 1715 / 31 July 1716	5 { 1 Aug. 1718 / 31 July 1719	8 { 1 Aug. 1721 / 31 July 1722	11 { 1 Aug. 1724 / 31 July 1725
3 { 1 Aug. 1716 / 31 July 1717	6 { 1 Aug. 1719 / 31 July 1720	9 { 1 Aug. 1722 / 31 July 1723	12 { 1 Aug. 1725 / 13 July 1726

13 { 1 Aug. 1726 / 11 June 1727

GEORGE THE SECOND.

1 { 11 June 1727 / 10 June 1728	9 { 11 June 1735 / 10 June 1736	17 { 11 June 1743 / 10 June 1744	25 { 11 June 1751 / 10 June 1752
2 { 11 June 1728 / 10 June 1729	10 { 11 June 1736 / 10 June 1737	18 { 11 June 1744 / 10 June 1745	26 { 11 June 1752 / 10 June 1753
3 { 11 June 1729 / 10 June 1730	11 { 11 June 1737 / 10 June 1738	19 { 11 June 1745 / 10 June 1746	27 { 11 June 1753 / 10 June 1754
4 { 11 June 1730 / 10 June 1731	12 { 11 June 1738 / 10 June 1739	20 { 11 June 1746 / 10 June 1747	28 { 11 June 1754 / 10 June 1755
5 { 11 June 1731 / 10 June 1732	13 { 11 June 1739 / 10 June 1740	21 { 11 June 1747 / 10 June 1748	29 { 11 June 1755 / 10 June 1756
6 { 11 June 1732 / 10 June 1733	14 { 11 June 1740 / 10 June 1741	22 { 11 June 1748 / 10 June 1749	30 { 11 June 1756 / 10 June 1757
7 { 11 June 1733 / 10 June 1734	15 { 11 June 1741 / 10 June 1742	23 { 11 June 1749 / 10 June 1750	31 { 11 June 1757 / 10 June 1758
8 { 11 June 1734 / 10 June 1735	16 { 11 June 1742 / 10 June 1743	24 { 11 June 1750 / 10 June 1751	32 { 11 June 1758 / 10 June 1759

33 { 11 June 1759 / 10 June 1760 | 34 { 11 June 1760 / 10 Oct. 1760

GEORGE THE THIRD.

1 { 25 Oct. 1760 / 24 Oct. 1761	4 { 25 Oct. 1763 / 24 Oct. 1764	7 { 25 Oct. 1766 / 24 Oct. 1767	10 { 25 Oct. 1769 / 24 Oct. 1770
2 { 25 Oct. 1761 / 24 Oct. 1762	5 { 25 Oct. 1764 / 24 Oct. 1765	8 { 25 Oct. 1767 / 24 Oct. 1768	11 { 25 Oct. 1770 / 24 Oct. 1771
3 { 25 Oct. 1762 / 24 Oct. 1763	6 { 25 Oct. 1765 / 24 Oct. 1766	9 { 25 Oct. 1768 / 24 Oct. 1769	12 { 25 Oct. 1771 / 24 Oct. 1772

REGNAL YEARS OF KINGS OF ENGLAND.

13	25 Oct. 1772 – 24 Oct. 1773	22	25 Oct. 1781 – 24 Oct. 1782	31	25 Oct. 1790 – 24 Oct. 1791	40	25 Oct. 1799 – 24 Oct. 1800
14	25 Oct. 1773 – 24 Oct. 1774	23	25 Oct. 1782 – 24 Oct. 1783	32	25 Oct. 1791 – 24 Oct. 1792	41	25 Oct. 1800 – 24 Oct. 1801
15	25 Oct. 1774 – 24 Oct. 1775	24	25 Oct. 1783 – 24 Oct. 1784	33	25 Oct. 1792 – 24 Oct. 1793	42	25 Oct. 1801 – 24 Oct. 1802
16	25 Oct. 1775 – 24 Oct. 1776	25	25 Oct. 1784 – 24 Oct. 1785	34	25 Oct. 1793 – 24 Oct. 1794	43	25 Oct. 1802 – 24 Oct. 1803
17	25 Oct. 1776 – 24 Oct. 1777	26	25 Oct. 1785 – 24 Oct. 1786	35	25 Oct. 1794 – 24 Oct. 1795	44	25 Oct. 1803 – 24 Oct. 1804
18	25 Oct. 1777 – 24 Oct. 1778	27	25 Oct. 1786 – 24 Oct. 1787	36	25 Oct. 1795 – 24 Oct. 1796	45	25 Oct. 1804 – 24 Oct. 1805
19	25 Oct. 1778 – 24 Oct. 1779	28	25 Oct. 1787 – 24 Oct. 1788	37	25 Oct. 1796 – 24 Oct. 1797	46	25 Oct. 1805 – 24 Oct. 1806
20	25 Oct. 1779 – 24 Oct. 1780	29	25 Oct. 1788 – 24 Oct. 1789	38	25 Oct. 1797 – 24 Oct. 1798	47	25 Oct. 1806 – 24 Oct. 1807
21	25 Oct. 1780 – 24 Oct. 1781	30	25 Oct. 1789 – 24 Oct. 1790	39	25 Oct. 1798 – 24 Oct. 1799	48	25 Oct. 1807 – 24 Oct. 1808
		49	25 Oct. 1808 – 24 Oct. 1809	50	25 Oct. 1809 – 24 Oct. 1810		

REGENCY.

51	25 Oct. 1810 – 5 Feb. 1811 – 24 Oct. 1811	53	25 Oct. 1812 – 24 Oct. 1813	55	25 Oct. 1814 – 24 Oct. 1815	57	25 Oct. 1816 – 24 Oct. 1817
52	25 Oct. 1811 – 24 Oct. 1812	54	25 Oct. 1813 – 24 Oct. 1814	56	25 Oct. 1815 – 24 Oct. 1816	58	25 Oct. 1817 – 24 Oct. 1818
		59	25 Oct. 1818 – 24 Oct. 1819	60	25 Oct. 1819 – 29 Jan. 1820		

GEORGE THE FOURTH.

1	29 Jan. 1820 – 28 Jan. 1821	3	29 Jan. 1822 – 28 Jan. 1823	5	29 Jan. 1824 – 28 Jan. 1825	7	29 Jan. 1826 – 28 Jan. 1827
2	29 Jan. 1821 – 28 Jan. 1822	4	29 Jan. 1823 – 28 Jan. 1824	6	29 Jan. 1825 – 28 Jan. 1826	8	29 Jan. 1827 – 28 Jan. 1828
		9	29 Jan. 1828 – 28 Jan. 1829	10	29 Jan. 1829 – 28 Jan. 1830	11	29 Jan. 1830 – 26 June 1830

WILLIAM THE FOURTH.

1	26 June 1830 – 25 June 1831	3	26 June 1832 – 25 June 1833	5	26 June 1834 – 25 June 1835	7	26 June 1836 – 20 June 1837
2	26 June 1831 – 25 June 1832	4	26 June 1833 – 25 June 1834	6	26 June 1835 – 25 June 1836		

VICTORIA.

1	20 June 1837 – 19 June 1838	2	20 June 1838 – 19 June 1839	3	20 June 1840 – 19 June 1841

LAW TERMS.

TABLE A.

SHEWING THE GOLDEN NUMBER, WHICH IS THE SAME BOTH IN THE OLD AND NEW STYLE, FROM THE BIRTH OF CHRIST TO A. D. 4000.

Hundreds of Years.			Years less than a Hundred.																	
			0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
			19	20	21	22	23	21	25	26	27	28	29	30	31	32	33	31	35	36	37
			38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56
			57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75
			76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94
			95	96	97	98	99														
0	1900	3800	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19
100	2000	3900	6	7	8	9	10	11	12	13	14	15	16	17	18	19	1	2	3	4	5
200	2100	4000	11	12	13	14	15	16	17	18	19	1	2	3	4	5	6	7	8	9	10
300	2200	——	16	17	18	19	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
400	2300	——	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	1
500	2400	——	7	8	9	10	11	12	13	14	15	16	17	18	19	1	2	3	4	5	6
600	2500	——	12	13	14	15	16	17	18	19	1	2	3	4	5	6	7	8	9	10	11
700	2600	——	17	18	19	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
800	2700	——	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	1	2
900	2800	——	8	9	10	11	12	13	14	15	16	17	18	19	1	2	3	4	5	6	7
1000	2900	——	13	14	15	16	17	18	19	1	2	3	4	5	6	7	8	9	10	11	12
1100	3000	——	18	19	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
1200	3100	——	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	1	2	3
1300	3200	——	9	10	11	12	13	14	15	16	17	18	19	1	2	3	4	5	6	7	8
1400	3300	——	14	15	16	17	18	19	1	2	3	4	5	6	7	8	9	10	11	12	13
1500	3400	——	19	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
1600	3500	——	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	1	2	3	4
1700	3600	——	10	11	12	13	14	15	16	17	18	19	1	2	3	4	5	6	7	8	9
1800	3700	——	15	16	17	18	19	1	2	3	4	5	6	7	8	9	10	11	12	13	14

EXPLANATION.—Enter the Table on the left hand with the number of centuries of the given year, and seek the years less than a hundred, at the head of the Table; and the Golden Number will be found where the columns meet.

TABLE B.

CONTAINING THE DOMINICAL LETTERS FOR 4200 YEARS AFTER THE CHRISTIAN ERA, OLD STYLE.

Years by which the given Year exceeds the Hundreds of Years.				Hundreds of Years after Christ.						
				0 700 1400 2100 2800 3500	100 800 1500 2200 2900 3600	200 900 1600 2300 3000 3700	300 1000 1700 2400 3100 3800	400 1100 1800 2500 3200 3900	500 1200 1900 2600 3300 4000	600 1300 2000 2700 3400 4100
0	28	56	84	D C	E D	F E	G F	A G	B A	C B
1	29	57	85	B	C	D	E	F	G	A
2	30	58	86	A	B	C	D	E	F	G
3	31	59	87	G	A	B	C	D	E	F
4	32	60	88	F E	G F	A G	B A	C B	D C	E D
5	33	61	89	D	E	F	G	A	B	C
6	34	62	90	C	D	E	F	G	A	B
7	35	63	91	B	C	D	E	F	G	A
8	36	64	92	A G	B A	C B	D C	E D	F E	G F
9	37	65	93	F	G	A	B	C	D	E
10	38	66	94	E	F	G	A	B	C	D
11	39	67	95	D	E	F	G	A	B	C
12	40	68	96	C B	D C	E D	F E	G F	A G	B A
13	41	69	97	A	B	C	D	E	F	G
14	42	70	98	G	A	B	C	D	E	F
15	43	71	99	F	G	A	B	C	D	E
16	44	72		E D	F E	G F	A G	B A	C B	D C
17	45	73		C	D	E	F	G	A	B
18	46	74		B	C	D	E	F	G	A
19	47	75		A	B	C	D	E	F	G
20	48	76		G F	A G	B A	C B	D C	E D	F E
21	49	77		E	F	G	A	B	C	D
22	50	78		D	E	F	G	A	B	C
23	51	79		C	D	E	F	G	A	B
24	52	80		B A	C B	D C	E D	F E	G F	A G
25	53	81		G	A	B	C	D	E	F
26	54	82		F	G	A	B	C	D	E
27	55	83		E	F	G	A	B	C	D

EXPLANATION.—Seek the hundreds of which a year consists at the top, and the years more than the hundreds at the side, on the left hand; and at the point where the lines cross each other in the table will be found the Dominical Letter or Letters for the year in question.

TABLE I.

Golden Number.	0	1	2	3	4	5	6
	A	B	C	D	E	F	G
1	8	8	8	8	7	7	7
2	6	6	6	6	6	6	6
3	9	9	9	9	9	8	8
4	8	7	7	7	7	7	7
5	6	6	6	6	5	5	5
6	9	9	8	8	8	8	8
7	7	7	7	7	7	6	6
8	10	10	10	6	9	9	9
9	8	8	8	8	8	8	7
10	7	7	6	6	6	6	6
11	9	9	9	9	9	9	9
12	8	8	8	7	7	7	7
13	6	7	6	6	6	6	5
14	9	9	9	9	8	8	6
15	7	7	7	7	7	7	7
16	6	6	6	5	5	5	5
17	9	8	8	8	8	8	8
18	7	7	7	7	7	6	6
19	10	10	9	9	9	9	9

LAW TERMS.

TABLE II.

Intervallum Minus.		Hilary Term		Easter Term		Trinity Term.				Michaelmas Term.					
						Before 1540.		After 1540.		Before 1641.		After 1641.		After 1752.	
Week	Day	began	ended	began	ended	began	ended	began	ended	began	ended	began	ended	began	ended
		Jan.	Feb.	Apr.	May	May	June	May	June	Oct.	Nov.	Oct.	Nov	Nov.	Nov.
5	3	23	12	8	4	24	8	22	10	9	28	23	28	6	28
5	4	23	12	9	5	25	9	23	11	9	28	23	28	6	28
5	5	23	12	10	6	26	10	24	12	9	28	23	28	6	28
5	6	23	12	11	7	27	11	25	13	9	28	23	28	6	28
6	0	23	13	12	8	28	12	26	14	9	28	23	28	6	28
6	1	24	12	13	9	29	13	27	15	10	28	24	28	7	28
6	2	23	12	14	10	30	14	28	16	9	29	23	29	6	29
6	3	23	12	15	11	31	15	29	17	9	28	23	28	6	28
						June									
6	4	23	12	16	12	1	16	30	18	9	28	23	28	6	28
6	5	23	12	17	13	2	17	31	19	9	28	23	28	6	28
								June							
6	6	23	12	18	14	3	18	1	20	9	28	23	28	6	28
7	0	24	13	19	15	4	19	2	21	9	28	23	28	6	28
7	1	23	12	20	16	5	20	3	22	10	28	24	28	7	28
7	2	23	12	21	17	6	21	4	23	9	29	23	29	6	29
7	3	23	12	22	18	7	22	5	24	9	28	23	28	6	28
7	4	23	12	23	19	8	23	6	25	9	28	23	28	6	28
7	5	23	12	24	20	9	24	7	26	9	28	23	28	6	28
7	6	23	12	25	21	10	25	8	27	9	28	23	28	6	28
8	0	23	13	26	22	11	26	9	28	9	28	23	28	6	28
8	1	24	12	27	23	12	27	10	29	10	28	24	28	7	28
							28								
8	2	23	12	28	24	13	29	11	30	9	29	23	29	6	29
							30		July						
8	3	23	12	29	25	14	July	12	1	9	28	23	28	6	28
8	4	23	12	30	26	15	1	13	2	9	28	23	28	6	28
				May											
8	5	23	12	1	27	16	2	14	3	9	28	23	28	6	28
8	6	23	12	2	28	17	3	15	4	9	28	23	28	6	28
9	0	23	13	3	29	18	4	16	5	9	28	23	28	6	28
9	1	24	12	4	30	19	5	17	6	10	28	24	28	7	28
9	2	23	12	5	31	20	6	18	7	9	29	23	29	6	29
					June										
9	3	23	12	6	1	21	7	19	8	9	28	23	28	6	28
9	4	23	12	7	2	22	8	20	9	9	28	23	28	6	28
9	5	23	12	8	3	23	9	21	10	9	28	23	28	6	28
9	6	23	12	9	4	24	10	22	11	9	28	23	28	6	28
10	0	23	12	10	5	25	11	23	12	9	28	23	28	6	28
10	1	24	13	11	6	26	12	24	13	10	28	24	28	7	28
10	2	23	12	12	7	27	13	25	14	9	29	23	29	6	29

[To use these tables, enter Table I. with the Golden Number of the year on the left hand, and the Dominical Letter at the top; the figures which occur in the column in the body of the table under the Dominical Letter and parallel to the Golden Number, represent weeks, and the figures immediately over the Dominical Letter represent days.]

[Enter Table II. with the two figures representing weeks and days in the column headed "*Intervallum minus,*" and the dates in a line parallel with the same figures shew the beginning and ending of all Terms in the year in question, *Old Style.*]

LAW TERMS FROM THE YEAR 1752.

A. D.	Terms.	Anno Regni.	Began.	Ended.
1752	Hilary	25 Geo. II.	January 23	February 13
	Easter	.....	April 15	May 11
	Trinity.....	25 & 26 Geo. II.	May 29	June 17
	Michaelmas..	26 Geo. II.	November 6	November 28
1753	Hilary	.....	January 23	February 12
	Easter	.....	May 9	June 4
	Trinity.....	27 Geo. II.	June 22	July 11
	Michaelmas..	.....	November 6	November 28
1754	Hilary	.....	January 23	February 12
	Easter	.....	May 1	May 27
	Trinity.....	28 Geo. II.	June 14	July 3
	Michaelmas..	.....	November 6	November 28
1755	Hilary	.....	January 23	February 12
	Easter	.....	April 16	May 12
	Trinity.....	28 & 29 Geo. II.	May 30	June 18
	Michaelmas..	29 Geo. II.	November 6	November 28
1756	Hilary	.....	January 23	February 12
	Easter	.....	May 5	May 31
	Trinity.....	30 Geo. II.	June 18	July 7
	Michaelmas..	.....	November 6	November 29
1757	Hilary	.....	January 24	February 12
	Easter	.....	April 27	May 23
	Trinity.....	30 & 31 Geo. II.	June 10	June 29
	Michaelmas..	31 Geo. II.	November 7	November 28
1758	Hilary	.....	January 23	February 13
	Easter	.....	April 12	May 8
	Trinity.....	31 & 32 Geo. II.	May 26	June 14
	Michaelmas..	31 Geo. II.	November 6	November 28
1759	Hilary	.....	January 23	February 12
	Easter	.....	May 2	May 28
	Trinity.....	33 Geo. II.	June 15	July 4
	Michaelmas..	.....	November 6	November 28
1760	Hilary	.....	January 23	February 12
	Easter	.....	April 23	May 19
	Trinity.....	33 & 34 Geo. II.	June 6	June 25
	Michaelmas..	1 Geo. III.	November 6	November 28
1761	Hilary	.....	January 23	February 12
	Easter	.....	April 8	May 4
	Trinity.....	.....	May 22	June 10
	Michaelmas..	2 Geo. III.	November 6	November 28
1762	Hilary	.....	January 23	February 12
	Easter	.....	April 28	May 24
	Trinity.....	.....	June 11	June 30
	Michaelmas..	3 Geo. III.	November 6	November 29
1763	Hilary	.....	January 24	February 12
	Easter	.....	April 20	May 16
	Trinity.....	.....	June 3	June 22
	Michaelmas..	4 Geo. III.	November 7	November 28
1764	Hilary	.....	January 23	February 12
	Easter	.....	May 9	June 4
	Trinity.....	.....	June 22	July 11
	Michaelmas..	5 Geo. III.	November 6	November 28
1765	Hilary	.....	January 23	February 12
	Easter	.....	April 24	May 20
	Trinity.....	.....	June 7	June 26
	Michaelmas..	6 Geo. III.	November 6	November 28
1766	Hilary	.....	January 23	February 12
	Easter	.....	April 16	May 12
	Trinity.....	.....	May 30	June 18
	Michaelmas..	7 Geo. III.	November 6	November 28

LAW TERMS.

A. D.	Terms.	Anno Regni.	Began.	Ended.
1767	Hilary	7 Geo. III.	January 23	February 12
	Easter	.....	May 6	June 1
	Trinity.....	.....	June 19	July 8
	Michaelmas..	8 Geo. III.	November 6	November 28
1768	Hilary	.....	January 23	February 12
	Easter	.....	April 20	May 16
	Trinity.....	.....	June 3	June 22
	Michaelmas..	9 Geo. III.	November 7	November 28
1769	Hilary	.....	January 23	February 13
	Easter	.....	April 12	May 8
	Trinity.....	.....	May 26	June 14
	Michaelmas..	10 Geo. III.	November 6	November 28
1770	Hilary	.....	January 23	February 12
	Easter	.....	May 2	May 28
	Trinity.....	.....	June 15	July 4
	Michaelmas..	11 Geo. III.	November 6	November 28
1771	Hilary	.....	January 23	February 12
	Easter	.....	April 17	May 13
	Trinity.....	.....	May 31	June 19
	Michaelmas..	12 Geo. III.	November 6	November 28
1772	Hilary	.....	January 23	February 12
	Easter	.....	May 6	June 1
	Trinity.....	.....	June 19	July 8
	Michaelmas..	13 Geo. III.	November 6	November 28
1773	Hilary	.....	January 23	February 12
	Easter	.....	April 28	May 24
	Trinity.....	.....	June 11	June 30
	Michaelmas..	14 Geo. III.	November 6	November 29
1774	Hilary	.....	January 24	February 12
	Easter	.....	April 20	May 16
	Trinity.....	.....	June 3	June 22
	Michaelmas..	15 Geo. III.	November 7	November 28
1775	Hilary	.....	January 24	February 13
	Easter	.....	May 3	May 29
	Trinity.....	.....	June 16	July 5
	Michaelmas..	16 Geo. III.	November 6	November 28
1776	Hilary	.....	January 23	February 12
	Easter	.....	April 24	May 20
	Trinity.....	.....	June 7	June 26
	Michaelmas..	17 Geo. III.	November 6	November 28
1777	Hilary	.....	January 23	February 12
	Easter	.....	April 16	May 12
	Trinity.....	.....	May 30	June 18
	Michaelmas..	18 Geo. III.	November 6	November 28
1778	Hilary	.....	January 23	February 12
	Easter	.....	May 6	June 1
	Trinity.....	.....	June 19	July 8
	Michaelmas..	19 Geo. III.	November 6	November 28
1779	Hilary	.....	January 23	February 12
	Easter	.....	April 21	May 17
	Trinity.....	.....	June 4	June 23
	Michaelmas..	20 Geo. III.	November 6	November 29
1780	Hilary	.....	January 24	February 12
	Easter	.....	April 12	May 8
	Trinity.....	.....	May 26	June 14
	Michaelmas..	21 Geo. III.	November 6	November 28
1781	Hilary	.....	January 23	February 12
	Easter	.....	May 2	May 28
	Trinity.....	.....	June 15	July 14
	Michaelmas..	22 Geo. III.	November 6	November 28
1782	Hilary	.....	January 23	February 12
	Easter	.....	April 17	May 13
	Trinity.....	.....	May 31	June 19
	Michaelmas..	23 Geo. III.	November 6	November 28

A. D.	Terms.	Anno Regni.	Began.	Ended.
1783	Hilary	23 Geo. III.	January 23	February 12
	Easter	.....	May 7	June 2
	Trinity.....	.....	June 20	July 9
	Michaelmas .	24 Geo. III.	November 6	November 28
1784	Hilary	.....	January 23	February 12
	Easter	.....	April 28	May 24
	Trinity.....	.....	June 11	June 30
	Michaelmas..	25 Geo. III.	November 6	November 29
1785	Hilary	.....	January 24	February 12
	Easter	.....	April 13	May 9
	Trinity.....	.....	May 27	June 15
	Michaelmas..	26 Geo. III.	November 7	November 28
1786	Hilary	.....	January 23	February 13
	Easter	.....	May 3	May 29
	Trinity.....	.....	June 16	July 5
	Michaelmas..	27 Geo. III.	November 6	November 28
1787	Hilary	.....	January 23	February 12
	Easter	.....	April 25	May 21
	Trinity.....	.....	June 8	June 27
	Michaelmas..	28 Geo. III.	November 6	November 28
1788	Hilary	.....	January 23	February 12
	Easter	.....	April 9	May 5
	Trinity.....	.....	May 23	June 11
	Michaelmas..	29 Geo. III.	November 6	November 28
1789	Hilary	.....	January 23	February 12
	Easter	.....	April 29	May 25
	Trinity.....	.....	June 12	July 1
	Michaelmas..	30 Geo. III.	November 6	November 28
1790	Hilary	.....	January 23	February 12
	Easter	.....	April 21	May 17
	Trinity.....	.....	June 4	June 23
	Michaelmas..	31 Geo. III.	November 6	November 29
1791	Hilary	.....	January 24	February 12
	Easter	.....	May 11	June 6
	Trinity.....	.....	June 24	July 13
	Michaelmas..	32 Geo. III.	November 7	November 28
1792	Hilary	.....	January 23	February 13
	Easter	.....	April 25	May 21
	Trinity.....	.....	June 8	June 27
	Michaelmas..	33 Geo. III.	November 6	November 28
1793	Hilary	.....	January 25	February 12
	Easter	.....	April 17	May 13
	Trinity.....	.....	May 31	June 19
	Michaelmas..	34 Geo. III.	November 6	November 28
1794	Hilary	.....	January 23	February 12
	Easter	.....	May 7	June 2
	Trinity.....	.....	June 20	July 9
	Michaelmas..	35 Geo. III.	November 6	November 28
1795	Hilary.....	.....	January 23	February 12
	Easter	.....	April 22	May 18
	Trinity.....	.....	June 5	June 25
	Michaelmas..	36 Geo. III.	November 6	November 28
1796	Hilary	.....	January 23	February 12
	Easter.....	.....	April 13	May 9
	Trinity.....	.....	May 27	June 15
	Michaelmas..	37 Geo. III.	November 7	November 28
1797	Hilary	.....	January 23	February 13
	Easter	.....	May 3	May 29
	Trinity.....	.....	June 16	July 5
	Michaelmas..	38 Geo. III.	November 6	November 28
1798	Hilary	.....	January 23	February 12
	Easter	.....	April 25	May 21
	Trinity.....	.....	June 8	June 27
	Michaelmas..	39 Geo. III.	November 6	November 28

LAW TERMS.

A. D.	Terms.	Anno Regni.	Began.	Ended.
1799	Hilary	39 Geo. III.	January 23	February 12
	Easter	.....	April 10	May 6
	Trinity.....	.....	May 24	June 12
	Michaelmas..	40 Geo. III.	November 6	November 28
1800	Hilary	.....	January 23	February 12
	Easter	.....	April 30	May 26
	Trinity.....	.....	June 13	July 2
	Michaelmas..	41 Geo. III.	November 6	November 28
1801	Hilary	.....	January 23	February 12
	Easter	.....	April 22	May 18
	Trinity.....	.....	June 5	June 25
	Michaelmas..	42 Geo. III.	November 6	November 28
1802	Hilary	.....	January 23	February 12
	Easter	.....	May 5	May 31
	Trinity.....	.....	June 18	July 7
	Michaelmas..	43 Geo. III.	November 6	November 29
1803	Hilary	.....	January 24	February 12
	Easter	.....	April 27	May 23
	Trinity.....	.....	June 10	June 29
	Michaelmas..	44 Geo. III.	November 7	November 28
1804	Hilary	.....	January 23	February 13
	Easter	.....	April 18	May 14
	Trinity.....	.....	June 1	June 20
	Michaelmas..	45 Geo. III.	November 6	November 28
1805	Hilary	.....	January 23	February 12
	Easter	.....	May 1	May 27
	Trinity.....	.....	June 14	July 3
	Michaelmas..	46 Geo. III.	November 6	November 28
1806	Hilary	.....	January 23	February 12
	Easter	.....	April 23	May 19
	Trinity.....	.....	June 6	June 25
	Michaelmas..	47 Geo. III.	November 6	November 28
1807	Hilary	.....	January 23	February 12
	Easter	.....	April 15	May 11
	Trinity.....	.....	May 29	June 17
	Michaelmas..	48 Geo. III.	November 6	November 28
1808	Hilary	.....	January 23	February 12
	Easter	.....	May 4	May 30
	Trinity.....	.....	June 17	July 6
	Michaelmas..	49 Geo III.	November 7	November 28
1809	Hilary	.....	January 23	February 13
	Easter	.....	April 19	May 15
	Trinity.....	.....	June 2	June 21
	Michaelmas..	50 Geo. III.	November 6	November 28
1810	Hilary	.....	January 23	February 12
	Easter	.....	May 9	June 4
	Trinity.....	.....	June 22	July 11
	Michaelmas..	51 Geo. III.	November 6	November 28
1811	Hilary	.....	January 23	February 12
	Easter	.....	May 1	May 27
	Trinity.....	.....	June 14	July 3
	Michaelmas..	52 Geo. III.	November 6	November 28
1812	Hilary	.....	January 23	February 12
	Easter	.....	April 15	May 11
	Trinity.....	.....	May 29	June 17
	Michaelmas..	53 Geo. III.	November 6	November 28
1813	Hilary	.....	January 23	February 12
	Easter	.....	May 5	May 31
	Trinity.....	.....	June 18	June 7
	Michaelmas..	54 Geo. III.	November 6	November 29
1814	Hilary	.....	January 23	February 12
	Easter	.....	April 27	May 23
	Trinity.....	.....	June 10	June 29
	Michaelmas..	55 Geo. III.	November 7	November 28

A. D.	Terms.	Anno Regni.	Began.	Ended.
1815	Hilary	55 Geo. III.	January 23	February 12
	Easter	.....	April 12	May 8
	Trinity	.....	May 26	June 14
	Michaelmas..	56 Geo. III.	November 6	November 28
1816	Hilary	.....	January 23	February 12
	Easter	.....	May 1	May 27
	Trinity	.....	June 14	July 3
	Michaelmas..	57 Geo. III.	November 6	November 28
1817	Hilary	.....	January 23	February 12
	Easter	.....	April 23	May 19
	Trinity	.....	June 6	June 25
	Michaelmas..	58 Geo. III.	November 6.	November 28
1818	Hilary	.....	January 23	February 12
	Easter	.....	April 8	May 4
	Trinity	.....	May 22	June 10
	Michaelmas..	59 Geo. III.	November 6	November 28
1819	Hilary	.....	January 23	February 12
	Easter	.....	April 28	May 24
	Trinity	.....	June 11	June 30
	Michaelmas..	60 Geo. III.	November 6	November 29
1820	Hilary	60 G. III & 1 G. IV.*	January 23	February 12
	Easter	.....	April 19	May 15
	Trinity	.....	June 2	June 21
	Michaelmas..	.....	November 6	November 28
1821	Hilary	1 & 2 Geo. IV.	January 23	February 12
	Easter	2 Geo. IV.	May 9	June 4
	Trinity	.....	June 22	July 11
	Michaelmas..	.....	November 6	November 28
1822	Hilary	2 & 3 Geo. IV.	January 23	February 12
	Easter	3 Geo. IV.	April 24	May 10
	Trinity	.....	June 7	June 26
	Michaelmas..	.....	November 6	November 28
1823	Hilary	3 & 4 Geo. IV.	January 23	February 12
	Easter	4 Geo. IV.	April 16	May 12
	Trinity	.....	May 30	June 18
	Michaelmas..	....	November	November 28
1824	Hilary	4 & 5 Geo. IV.	January 23	February 12
	Easter	5 Geo. 4.	May 5	May 31
	Trinity	.....	June 18	July 7
	Michaelmas..	.....	November 6	November 29
1825	Hilary	5 & 6 Geo. IV.	January 24	February 12
	Easter	6 Geo. IV.	April 20	May 16
	Trinity	.....	June 3	June 22
	Michaelmas..	.....	November 7	November 28
1826	Hilary	6 & 7 Geo. IV.	January 23	February 13
	Easter	7 Geo. IV.	April 12	May 8
	Trinity	.....	May 26	June 14
	Michaelmas..	.....	November 6	November 28
1827	Hilary	7 & 8 Geo. IV.	January 23	February 12
	Easter	8 Geo. IV.	May 2	May 28
	Trinity	.....	June 15	July 4
	Michaelmas..	.....	November 6	November 28
1828	Hilary	8 & 9 Geo. IV.	January 23	February 12
	Easter	9 Geo. IV.	April 23	May 19
	Trinity	.....	June 6	June 25
	Michaelmas..	.....	November 6	November 28
1829	Hilary	9 & 10 Geo. IV.	January 23	February 12
	Easter	10 Geo. IV.	May 6	June 1
	Trinity	.....	June 19	July 8
	Michaelmas..	.....	November 6	November 28
1830	Hilary	10 & 11 Geo. IV.	January 23	February 12
	Easter	11 Geo. IV.	April 28	May 24
	Trinity	.....	June 11	June 30
	Michaelmas..	1 Will. IV.	November 6	November 29

* Geo. 4, began his reign on the 29th Jan. 1820.

LAW TERMS.

[By the stat. 11 Geo. 4 & 1 Will. 4, c. 70, it is enacted, that in the year 1831, and afterwards, Hilary Term shall begin January 11, and end January 31; Easter Term shall begin April 15, and end May 8; Trinity Term shall begin May 22, and end June 12; Michaelmas Term shall begin November 2, and end November 25.]

[And by 1 Will. 4, c. 3, if the last day of Term, appointed by the above act, fall on a Sunday, then the next Monday shall be the last day; and if any of the days between the Thursday before, and the Wednesday next after Easter fall within Easter Term, such days shall be deemed and taken to be part of such Term, although there shall be no sittings in banco on any such intervening days.]

ABSTRACTS.

PRECEDENTS.

[1. Abstract *of the* Title *of* John Scott, Mary Scott, *and* Jane Scott, *to certain* Freehold Messuages, Houses, *and* Tenements, *in the Parish of* Thorpe, *in the North Riding of* Yorkshire.

Jan. 7, 1753. Indenture of Mortgage, Between Henry Howard, of the one part, and Thomas Donne of the other part.

It was witnessed, in consideration of £50 to said Henry Howard, paid by said Thomas Donne, said Henry Howard did grant, bargain, sell, demise, and to farm let, unto said Thomas Donne, his executors, administrators, and assigns, (inter alia),

All that messuage or tenement, with the yard, orchard, barn, and other appurtenances unto the same belonging, commonly called Drake's, in the parish of Thorpe, in the North Riding of the county of York, in a street there, called Jock's End, between the King's highway or street there on the west part thereof; the messuage thereinafter mentioned and a land sometimes called Smith's way, on the north part thereof; a field called Scott's field, on the east part; and an inn, called the Cavalier, on the south part thereof; and then in the tenure or occupation of Thomas Wood, his undertenants, or assigns: And also all that other messuage, cottage, or tenement, situate, standing, and being in Thorpe aforesaid, in the said street called Jock's End, and adjoining to the aforesaid messuage or tenement, and commonly called or known by the name or sign of the Old Plough,

JAN. 7, 1753. (a) being then in the tenure or occupation of Mary Edwards and John Metcalf, or one of them, their, or one of their assigns, or under-tenants: AND ALSO ALL and singular other the freehold messuages, cottages, lands, tenements, hereditaments, and premises whatsoever, of him said Henry Howard, situate, lying, and being in Thorpe aforesaid;

AND all and singular cellars, sollars, &c.;

AND the reversion, &c.;

AND all the estate, &c.:

TO HOLD the same unto said Thomas Donne, his executors, administrators, and assigns, from the day next before the day of the date of the now abstracting indenture, for the term of 1000 years, from thenceforth without impeachment of waste, at one pepper-corn rent: PROVISO for making void present indenture, on payment of £50, with lawful interest for the same, on the 27th day of July, then next ensuing.

COVENANT by said Henry Howard, for payment of said £50, with lawful interest: That he had right to convey, for quiet enjoyment after default, and for further assurance after default.

EXECUTED by said Henry Howard, and attested, and RECEIPT for consideration indorsed.

REGISTERED at Northallerton, 2nd February, 1753. B. 2, No. 472.

SEP. 3, 1756. INDENTURE OF ASSIGNMENT, BETWEEN said Thomas Donne, of the first part, said Henry Howard, of the second part, and Caroline Becher, of the third part.

RECITING the before abstracted indenture.

RECITING, that said Henry Howard, having occasion to borrow the further sum of £20, had applied to said Caroline Becher, who had agreed to advance the same, on security of the said premises, and also to advance said principal sum of £50, to pay off said Thomas Donne;

IT WAS WITNESSED, that, in consideration of said sum of £50

(a) [The repetition of the date of the instrument under abstraction, at the beginning of a new folio, facilitates the perusal of the Abstract.]

Sep. 3, 1756. to said Thomas Donne paid by said Caroline Becher, by the request and direction of said Henry Howard, said Thomas Donne did bargain, sell, assign, transfer, and set over unto said Caroline Becher, her executors, administrators, and assigns, (inter alia),

All [the before abstracted premises;]

And all the estate, &c.:

To hold the same unto said Caroline Becher, her executors, administrators, and assigns, from thenceforth, for the residue of said term of 1000 years.

Covenant from said Thomas Donne to said Caroline Becher, that he had not incumbered.

It was further witnessed, that in consideration of said sum of £50, paid by said Caroline Becher to said Thomas Donne, at the request of said Henry Howard, and also in consideration of the further sum of £20 to said Henry Howard, paid by said Caroline Becher, said Henry Howard did grant, ratify, confirm, and demise unto said Caroline Becher, her executors, administrators, and assigns, (inter alia),

All [the before abstracted premises;]

To hold the same unto said Caroline Becher, her executors, administrators, and assigns, from thenceforth, for all the residue of said term of 1000 years, without impeachment of waste, discharged from the before mentioned proviso for redemption.

Proviso for re-assignment, or surrender, on payment of £70, with interest, on the 23rd day of March, then next ensuing.

Covenant for payment of said £70, with interest, and for further assurance, after default.

Executed by said Thomas Donne, and Henry Howard, and attested, and receipts for considerations indorsed.

Registered at Northallerton, 5th November, 1756. B. 5, No. 234.

Dec. 8 & 9, 1758. Indentures of Lease and Release, the release between said Henry Howard, and Harriet his wife, of the one part, and William Watts, of the other part.

It was witnessed, that in consideration of 47*l.* 2*s.* 6*d.* to said Henry Howard paid by said William Watts, and also of 77*l.* 17*s.* 6*d.*

Dec. 8 & 9, 1758. paid by said William Watts, in discharge of principal and interest due; said Henry Howard did grant, bargain, sell, alien, enfeoff, remise, release, and for ever quit-claim and confirm unto said William Watts, (in his actual possession, &c.), and to his heirs and assigns.

All [the before abstracted premises;]

And all and singular cellars, sollars, &c.;

And also all and singular the freehold messuages, &c., of him, said Henry Howard, situate in the said parish of Thorpe;

And the reversion, &c.;

And all the estate, &c.:

To Hold the same unto said William Watts, his heirs, and assigns;

To the only proper Use and behoof of said William Watts, his heirs, and assigns, for ever.

Covenant to levy a fine, before the end of Hilary Term then next ensuing, to enure to the use and behoof of said William Watts, his heirs, and assigns, for ever.

Covenant from said Henry Howard, that he was well seised: That he had right to convey, for quiet enjoyment, (subject to the before abstracted mortgage therein mentioned), and for further assurance.

Executed by said Henry Howard, and Harriet his wife, and attested, and receipt for consideration indorsed.

Registered at Northallerton, 10th January, 1759. B. 2, Nos. 75 and 76.

Dec. 9, 1758. Indenture of Assignment, between said Caroline Becher, of the first part, said Henry Howard, of the second part, said William Watts, of the third part, and John Vale, of the fourth part.

Reciting the hereinbefore abstracted indenture of the 7th day of January, 1753.

Reciting the hereinbefore abstracted indenture of the 3rd September, 1756;

Reciting that the estate of said Caroline Becher was then become absolute in the law, for the residue of the said term of 1000 years;

Reciting that the said principal sum of £70, secured by

Dec. 9, 1758. the lastly therein in part recited indenture, remained due to the said Caroline Becher, together with 7*l.* 17*s.* 6*d.* interest, to the day of the date thereof;

It was witnessed, that for and in consideration of the sum of 77*l.* 17*s.* 6*d.* to said Caroline Becher, by direction of said Henry Howard, paid by said William Watts, and of 5*s.* to Caroline Becher paid by said John Vale, said Caroline Becher did bargain, sell, assign, and set over, unto the said John Vale, his executors, administrators, and assigns,

All [the before abstracted premises;]

And the reversion, &c.;

And all the estate, &c.:

To hold the same to the said John Vale, his executors, administrators, and assigns, as for and concerning the aforesaid premises,

In trust for said William Watts, his heirs, and assigns, and to the intent that the said term of 1000 years, as to the said premises so purchased by said William Watts, might not be merged, but might attend the reversion and inheritance, &c.

Covenant from said Caroline Becher, that she had done no act to incumber.

Executed by all parties, and duly attested, and receipt for consideration indorsed.

Registered at Northallerton, 10th January, 1759. B. 2, No. 39.

Hil. T. 32 G. 2, (1758). Indentures of Fine, between William Watts, plaintiff, and said Henry Howard and Harriet, his wife, deforceants, of two messuages, two cottages, one barn, one curtilage, one garden, one orchard, with the appurtenances, in the parish of Thorpe.

Dec. 8 & 9, 1759. Indentures of Lease and Release, by way of mortgage, the release being between said William Watts and Amelia, his wife, of the one part, and John Murray, of the other part.

Reciting the before abstracted indentures of lease and release, of the 8th and 9th December, 1758;

It was witnessed, that in consideration of 127*l.* 5*s.* 0*d.*, said William Watts did grant, bargain, sell, remise, release, and confirm unto said John Murray, in his actual possession, &c., and to his heirs and assigns,

Dec. 8 & 9, 1759.

All [the before abstracted premises;]

To hold the same unto said John Murray, his heirs and assigns, for ever.

Proviso for making void the now abstracting indenture, on payment, by said William Watts, of 127*l.* 5*s.* 0*d.*, with lawful interest, on the 31st day of December, then next.

Covenant for payment of said 127*l.* 5*s.* 0*d.* with interest.

Covenant to levy a fine in or of Hilary Term then next, or in or of some other subsequent term.

Covenant from said William Watts, that he had right to convey free from incumbrances, and that he was well seised for quiet enjoyment after default, free from incumbrances, for further assurance after default, for mortgagor's quiet enjoyment until default, and for insuring, and assigning policy of insurance.

Executed by all parties, attested, and receipt for consideration indorsed.

Registered at Northallerton, 27th February, 1760. B. 2, No. 419.

Eas. T. 33 G. 2, (1759).

Indentures of Fine, between said John Murray, plaintiff, and said William Watts and Amelia, his wife, deforceants, of two messuages, one cottage, one orchard, and one barn, with the appurtenances, in the parish of Thorpe.

Dec. 2 & 3, 1765.

Indentures of Lease and Release, the release being between Elizabeth Murray, of the first part, said William Watts and Amelia, his wife, of the second part, and Henry Green, of the third part.

Reciting the before abstracted indentures of lease and release, of the 8th and 9th December, 1758, and the fine levied in pursuance of the said indenture of release;

Reciting, that said William Watts did not pay said 127*l.* 5*s.* 0*d.*, to said John Murray, who was since dead, having duly made and published his last will and testament in writing, bearing date the 3rd April, 1754, and thereby devised all his freehold or real estate unto his wife, the said Elizabeth Murray, her heirs and assigns; and after some pecuniary legacies therein mentioned, gave all his chattels, real and personal estate, not therein otherwise disposed of, unto his said wife, Elizabeth Murray, her executors and administrators, and appointed her sole executrix thereof, who, on or about the 17th March, 1761,

Dec. 2 & 3, 1765. duly proved the said will in the Prerogative Court of York;

Reciting, that the sum of 17*l.* 5*s.* 0*d.*, part of said principal sum of 127*l.* 5*s.* 0*d.*, together with all interest for the same, to the day of the date of the now abstracting indenture, had been paid to said Elizabeth Murray, by said William Watts, whereupon £110 then only remained due:

It was witnessed, that in consideration of £110 to said Elizabeth Murray, and of 5*s.* to said William Watts, they did grant, bargain, sell, alien, remise, release, and for ever quit-claim, and confirm unto Henry Green, (in his actual possession, &c.), and to his heirs and assigns,

All [the before abstracted premises;]

To hold the same unto said Henry Green, his heirs and assigns, for ever.

Covenant to levy a fine of Hilary Term then next, or of some other subsequent term.

Covenant by said Elizabeth Murray, that she and the said John Murray, her late husband, had done no act to incumber.

Covenant by said William Watts, that he and said Elizabeth Murray had good right to convey, for quiet enjoyment, (the therein mentioned mortgage, of the 7th day of January, 1753, only excepted), for further assurance.

Declaration by all said parties, that said fine should be and enure to the only proper use and behoof of the said Henry Green, his heirs and assigns, for ever.

Executed by said Elizabeth Murray, and William Watts and Amelia, his wife, and attested, and receipt for consideration indorsed.

Registered at Northallerton, 26th February, 1766. B. 2, Nos. 123 and 124.

Hil. T. 6 G.3. (1766). Indentures of Fine, between Henry Green, plaintiff, and William Watts and Amelia, his wife, deforceants, of two messuages, one cottage, one barn, one stable, one garden, and one orchard, with the appurtenances, in the parish of Thorpe.

Jan. 17, 1766. Indenture of Assignment, between said John Vale, of the first part, said William Watts, of the second part, said Henry Green, of the third part, and George Watson, of the fourth part.

JAN. 17, 1766. RECITING the hereinbefore abstracted indenture of mortgage, of the 7th January, 1753.

RECITING the hereinbefore mentioned indenture, of the 3rd September, 1756.

RECITING the hereinbefore mentioned indenture of assignment, of the 9th December, 1758.

RECITING, as in the now abstracting indenture is recited.

IT WAS WITNESSED, that in consideration of 5*s.* paid by said James Watson, said John Vale, (by direction of said William Watts, and Henry Green), did bargain, sell, assign, transfer, and set over unto said George Watson, his executors, administrators, and assigns, (inter alia),

ALL the premises comprised in the thereinbefore in part recited indenture of mortgage, and thereinbefore in part recited indenture of assignment.

TO HOLD the same unto said George Watson, his executors, administrators, and assigns, as for and concerning all said premises, in trust for said Henry Green, his heirs, and assigns, and to attend the inheritance.

COVENANT from said John Vale, that he had done no act to incumber.

EXECUTED by all parties, and duly attested.

REGISTERED, at Northallerton, 26th February, 1766. B. 2, No. 135.

FEB. 7, 1766. THE said HENRY GREEN, by his WILL, of this date, after directing his just debts and funeral expenses to be paid, gave and bequeathed

ALL the rest, residue, and remainder of his estate and effects, both real and personal, of what nature or kind soever,

UNTO John Reader, and Charles Norton, their heirs, executors, administrators, and assigns, for ever.

UPON TRUST, as to such real estates, that they, or the survivor of them, his executors, or administrators, should pay the rents, issues, and profits thereof, unto Elizabeth Melon, then the wife of James Melon, during her life, for her separate and inalienable use, and

UPON TRUST, to transfer, assign, and set over, release, and confirm such real estates, and the rents, issues, and profits thereof, in such manner, and to such person and persons, as the said Elizabeth Melon should, by her last will and testament in writing, duly made and published, notwith-

Feb. 7, 1766. standing her then present or any future coverture she should or might happen to be under, give, direct, limit, and appoint.

Executed by testator, and attested by John Smith, Thomas Reid, and Mary Ward (*a*).

Proved, 17th April, 1765, in the Prerogative Court of York.

Dec. 2, 1766. The said Henry Green died.

July 3, 1774. The said Elizabeth Melon, by her Will, of this date gave and devised

All her freehold messuages, lands, tenements, and hereditaments whatsoever, with appurtenances, situate in the parish of Thorpe, aforesaid, (except the freehold messuage in the occupation of William Henderson which she had thereinbefore given to Henry Green),

To John Foot, Thomas Wing, and Edward Morton, their heirs and assigns,

In Trust, that they, or the survivors or survivor of them, his heirs and assigns, should, as soon as might be after her decease, sell and dispose of the same by public auction: And for facilitating the sale thereof, she did order and direct that the receipts of the said John Foot, Thomas Wing, and Edward Morton, or either of them, should be sufficient discharges for such purchase-money: And the said testatrix did give, devise, and bequeath the rents and profits of the said premises, and the purchase-money thereof, when sold, unto the several persons in her said will named, in manner therein mentioned: And the said testatrix appointed the said John Foot, Thomas Wing, and Edward Morton executors.

Executed by said testatrix, and attested by three witnesses.

Proved, 15th January, 1777, in the Prerogative Court of York.

(*a*) [The names of the witnesses to a will should always be stated, that it may be seen that no devise or bequest has been invalidated by the making the devisee or legatee a witness.]

Nov. 3, 1776. The said Elizabeth Melon died.

Feb. 6, 1777. Indenture of Bargain and Sale, enrolled in Chancery, between said Charles Norton, surviving devisee in trust, named in the last will and testament of said Henry Green, of the one part, and said John Foot, Thomas Wing, and Edward Morton, of the other part.

Reciting (amongst other things) the before abstracted will of said Henry Green:

Reciting, that said John Reader, James Melon, and Elizabeth, his wife, survived said Henry Green, and were all since dead; and that said James Melon departed this life in the lifetime of said Elizabeth, his wife:

Reciting the before abstracted will of said Elizabeth Melon:

It was witnessed, that for the considerations therein mentioned, said Charles Norton did bargain and sell unto said John Foot, Thomas Wing, and Edward Morton, their heirs and assigns,

All and every the freehold messuages, lands, tenements, and hereditaments whatsoever, situate in the parish of Thorpe, whereof or wherein said Henry Green, in his lifetime, and at the time of his decease, was seised of any estate of freehold or inheritance, and which in and by the will of said Elizabeth Melon, were given and devised to said Foot, Wing, and Morton, their heirs, in trust as aforesaid, (except a certain messuage called the Dragon, and said premises in the occupation of William Henderson);

Together with all ways, &c.;

And all the estate, &c.:

To hold the same (except as before excepted) unto and to the use and behoof of said Foot, Wing, and Morton, their heirs and assigns, for ever; but, nevertheless,

Upon the Trusts, and to and for the ends, intents, and purposes mentioned, expressed, or declared, of, touching, or concerning the same, in or by the said before abstracted will of the said Elizabeth Melon, deceased, and for no other use.

Executed by all parties, and attested.

Enrolled 2nd March, 1777.

Feb. 6 & 7, 1777. Indentures of Lease and Release, the release being between said John Foot, Thomas Wing, and Edward Morton, of the one part, and James Stone, of the other part.

Reciting the before abstracted will of said Henry Green;

Reciting the before abstracted will of Elizabeth Melon;

Reciting sale by public auction;

Reciting the before abstracted indenture of bargain and sale, of the 6th February, 1777:

It was witnessed, that, in performance of the trusts thereinbefore recited, and in consideration of £260, paid to said Foot, Wing, and Morton, by said James Stone, said Foot, Wing, and Morton, did bargain, sell, alien, release, and confirm unto said James Stone, (in his actual possession, &c.), to his heirs,

All [the before abstracted premises;]

To hold the same unto said James Stone, his heirs and assigns:

To the Use of said James Stone, his heirs and assigns, for ever, subject to the therein mentioned lease.

Covenant by said Foot, Wing, and Morton, that they had done no act to incumber, (except said lease), and for further assurance.

Executed by said Foot, Wing, and Morton, and attested, and receipt for consideration indorsed.

Registered at Northallerton, 8th March, 1777. B. 2, No. 177.

Aug. 1800. The said James Stone died intestate, and without issue, whereupon the estate descended to Thomas Stone, his only brother, and heir at law.

Sep. 8, 1808. The said Thomas Stone, by his will of this date,

His freehold estate, situate in the said parish of Thorpe, and North Riding of Yorkshire, consisting of four tenements, three of them then in the occupation of Philip Palmer, John Smith, Henry Green, and one then late in the occupation of Stephen Tester, with the yards, gardens, and premises thereunto belonging,

Gave, devised, and bequeathed unto his niece, Elizabeth Scott, during the term of her natural life, to take the rents and profits thereof to her sole and separate use, she committing and suffering no manner of waste. If his said niece, Elizabeth Scott, should

Sep. 8,
1808. die, leaving no child behind her, then, and in such case, he gave, devised, and bequeathed the before-mentioned freehold estate unto his nephew, Joseph Scott; but if his said nephew, Joseph Scott, should die before his said niece, Elizabeth Scott, in such case he gave and bequeathed his before-mentioned freehold estate unto his [*i. e.* Joseph Scott's] two daughters, Mary Scott, and Jane Scott, to be equally divided between them; but, if his said niece, Elizabeth Scott, should die, leaving a child or children behind her, then, and in such case, he willed and directed, that the whole of his before-mentioned freehold estate might be sold for the most money that could be got, as soon as conveniently could be after his decease, and the whole of the money arising from the sale thereof be divided into two equal parts; one equal part whereof he gave and bequeathed unto the children that his said niece, Elizabeth Scott, should leave behind her, to be equally divided among them; if but one, all to such one; the other equal part he gave and bequeathed unto his said nephew, Joseph Scott, if he should be living at the time of such sale, if not, unto his aforesaid daughters, to be equally divided between them, if but one of them should be living, all to such one.

Executed and attested by three witnesses.

The said Joseph Scott died in the lifetime of said Elizabeth Scott.

The said Elizabeth Scott afterwards died without issue.

John Scott is the heir at law of said James Stone, as appears by the following sketch of his pedigree:

(*Here insert pedigree, for which the Table of descent, ante, p.* 148, *or the Table, infra, p.* 336, *may serve as a model*).]

[2. Abstract *of the title of* John William Bacon, Esq. *to Freehold and Copyhold Estates at* Hendon, *in the county of* Middlesex.

36 H. 8, June 9. By INDENTURE of this date, made between the King and the Dean and Chapter of St. Paul's, London,

Reciting a conveyance to the King of divers hereditaments in Essex, in consideration whereof

The King bargained and sold, (inter alia),

The manor of Layton, cumptiis, late belonging to the priory of St. John of Jerusalem:

To hold the same unto the Dean and Chapter of St. Paul's, and their successors for ever, in Frankalmoyne, at the yearly rent of 33*l.* 0*s.* 3*d.*, clear of all other outgoings.

Taken and acknowledged 31st May, 36th Henry 8th, by Sir J. Rich.

Executed by Dean and Chapter.

14 Eliz. Aug. 1, 1572. By a grant from the Queen to the Dean and Chapter of the cathedral church of St. Paul's, London, and to their successors,

Reciting, that her father, Henry 8th, had, by his letters patent, given and granted to the said Dean and Chapter, (inter alia), all his manor of Layton, in the county of Middlesex, hereinbefore mentioned.

To hold the same to the said Dean and Chapter, and their successors, at the yearly rent of 33*l.* 1*s.* 1*d.*, for all rents and services to be rendered or paid:

It is witnessed, that for the considerations therein mentioned, the said Queen did give, grant, remise, and release to the aforesaid Dean and Chapter,

All the aforesaid yearly rent of 33*l.* 1*s.* 1*d.*, reserved as aforesaid by the thereinbefore recited letters patent:

To hold the same to the Dean and Chapter, and their successors, for ever.

14 Eliz.
Aug. 1, (1572). To the use of the said Dean and Chapter, and their successors, for ever.

And Further, that for the considerations aforesaid, the said Queen did grant to the aforesaid Dean and Chapter, that they should have her letters patent, duly made and sealed, without fine or fee whatsoever, the statute against putting lands and tenements into mortmain in anywise notwithstanding.

Executed by the Queen herself at Gorhambury, 1st August, 1572. (*a*)

Nov. 3, 1797. 38 Geo. 3, c. 5, An Act of Parliament, which granted an aid to his Majesty, by a land-tax to be raised in Great Britain for the service of the year 1798. (A printed copy accompanies this abstract).

Jun. 21, 1798. 38 Geo. 3, c. 60, An Act of Parliament for making perpetual (subject to reduction and purchase) the several sums of money then charged in Great Britain as a land-tax for one year, from the 25th day of March, 1798.

Section 11 Empowers all bodies politic, corporate, or collegiate, and corporations aggregate or sole, seised or possessed of any manors, messuages, lands, tenements, or hereditaments, whereon any land-tax thereby made saleable shall be charged, to contract and agree for the reduction of such land-tax, or any part thereof, notwithstanding any statutes of mortmain or other statutes to the contrary.

Section 19 Empowers all bodies politic, &c., in the actual possession of or entitled beneficially to the rents and profits of such manors, &c., under the restrictions or regulations thereinafter mentioned, to sell such part or parts of such manors, &c., as shall be eligible and necessary for the purpose of redeeming or purchasing such land-tax; and by indenture or indentures duly sealed and delivered, and enrolled for estates in England within six calendar months after the execution thereof in any of his Majesty's courts of record at Westminster, or registered in the counties of Middlesex and York, in the manner required by law, absolutely to convey the same, freed and discharged from land-tax, unto any person or persons whomsoever; or to charge a sufficient part of the said manors, &c., in manner therein mentioned.

(*a*) [It seems to be the better opinion that the vendor would not be bound to furnish the purchaser with a copy of an ancient grant from the Crown; it is sufficient if he inform him of the place of its deposit.]

(A printed copy of the act accompanies this abstract).

Mar. 21, 1799. 39 Geo. 3, c. 29, An Act of Parliament to amend and render more effectual the two last-mentioned acts;

Repeats various restrictive enactments in former acts, and contains further enactments to amend those acts.

(A printed copy of the act accompanies this abstract).

Apr. 3, 1800. By Indenture of bargain and sale, enrolled, between the Right Reverend Father in God George Lord Bishop of Lincoln, Dean of the Cathedral Church of St. Paul's, London, and the Chapter of the same church, of the first part, the Right Honourable William Lord Auckland, and the Right Honourable Sylvester Douglas, (two of the Commissioners appointed by his Majesty's letters patent under the Great Seal of Great Britain, by virtue of the 39th Geo. 3, entitled, &c., being the act lastly before mentioned), of the second part, and John Ford, of the third part;

Reciting, that the said Dean and Chapter were desirous of availing themselves of the powers which, by the several before-mentioned acts of the 38th and 39th of George the Third, were given to bodies corporate, for enabling them to sell a competent part of the manors, &c., for redeeming or purchasing their land-tax, and had contracted to sell to the said John Ford the freehold estate and premises hereinafter described, being part of the estates which the said Dean and Chapter were entitled to, in right of the said Chapter, for the sum of 10,942*l.* 12*s.* 5*d.*, and that the said Right Honourable Commissioners, parties thereto, had agreed to confirm such contract:

It was witnessed, that in consideration of the sum of 10,942*l.* 12*s.* 5*d.* by the said John Ford paid into the Bank of England, to be there placed to the account of the Commissioners for the Reduction of the National Debt, as by the receipt of R. Aslett, one of the cashiers of the Bank, thereon indorsed did appear, the said Dean and Chapter, in exercise of the power vested in them by the several acts hereinbefore referred to, did grant, bargain, sell, and convey by the now abstracting indenture, duly sealed and delivered, and intended to be enrolled or registered as the law required for the conveyance of estates sold to purchase or redeem land-tax, with the consent, authority, or approbation of the said Right Honourable Commissioners thereinbefore named, testified

Apr. 3,
1803. as therein expressed; and the said Commissioners did thereby confirm unto the said J. Ford and his heirs,

All that capital messuage, and site of the manor of Layton, with the appurtenances, situate in the parish of Hendon, in the county of Middlesex, together with all the outhouses, buildings, barns, stables, dovehouses, and other edifices, moats, ponds, yards, backsides, orchards, and gardens, to the said site and capital messuage of right belonging or appertaining: and also all demesne lands, meadows, &c.: And also all rents of assize, &c., Excepting all that land or grove called the Priest's Grove, parcel of the demesnes of the said manor, containing by estimation one acre, and also excepting all lands, tenements, and hereditaments whatsoever, grantable by copy of Court Roll, and all Courts Baron, Courts Leet, and view of frankpledge, and all customary courts, and all perquisites of courts, fines, and other profits, and the advowson of Friern Barnet: And the reversion:

To hold the same unto the said John Ford, his heirs and assigns,

To the use of the said John Ford, his heirs and assigns, for ever, discharged from all land-tax and other incumbrances.

Covenant by the said Dean and Chapter that they had not incumbered.

Executed by the said John Ford, Lord Auckland, and Sylvester Douglas, and the common seal of the said Dean and Chapter affixed thereto.

Receipt for consideration-money, under the hand of R. Aslett, thereon endorsed.

Enrolled in the Court of Common Pleas, 4th Geo. 3rd, Roll, 106.

Registered 14th March, 1807, B. 2, No. 471.

Jan. 3, The said John Ford by his will,
1804. After reciting that his son John William Ford had been disappointed of a legacy of £1000, intended to have been bequeathed to him by his godmother, Mary Thompson, the late wife of Sir William Thompson, Bart., upon which he had relied to answer some temporary debts,

Gave unto the said John William Ford the sum of £1000 abso-

JAN. 7,
1808. lutely, and charged all his real estate with payment thereof, and subject thereto

HE GAVE, devised, and bequeathed unto his own two sons, J. W. Ford, and Francis D'Arcy Ford, and to their heirs, executors, and administrators,

ALL his real and personal estates of whatever nature or kind soever, and wheresoever the same might be, and of which he might die seised or possessed,

IN TRUST, nevertheless as to one equal third part thereof, to and for the use and behoof of his said son John William Ford, his heirs, executors, administrators, and assigns, for ever;

AND AS TO one other third part thereof,

IN TRUST for his said son Francis D'Arcy Ford, his heirs, executors, administrators, and assigns, for ever.

And to the remaining third part thereof,

IN TRUST, that they his said two sons, their heirs, executors, or administrators, should pay the rents, issues, dividends, interest, and produce thereof, into the hands of his daughter Maria, then Maria Thompson, the wife of Sir William Thompson, Bart., to and for her own separate use during her life, and not to be subject to the debts, &c., of any husband, and her receipts to be discharges; and from and after the decease of his said daughter,

THEN IN TRUST for the child or children of his said daughter living at the time of her decease, to be divided between or amongst them, if more than one, in equal shares and proportions; or if there should be only one such child, then to such only child, his or her heirs, administrators, or assigns.

BUT, in case his said daughter should have no issue, or no issue living at the time of her decease,

THEN he gave, devised, and bequeathed such remaining third part of his said estate and effects

UNTO his said two sons, their heirs, executors, administrators, and assigns, for ever, in equal shares.

AND the said testator appointed his said two sons executors of his will.

DULY executed by the testator in the presence of, and attested by, three witnesses.

July 7, 1808. The said testator made a codicil to his said will, whereby he nominated and appointed his friend, Charles Anster, a trustee of his above-written will, to act in conjunction with his two sons, and that in as full and ample a manner as if he had been originally named a trustee in his said will.

Duly executed by the testator in the presence of, and attested by, three witnesses.

The said will and codicil were proved by the said John William Ford, and Francis D'Arcy Ford, only, in the Prerogative Court of Canterbury, the 16th March, 1816.

Registered 24th May, 1821, B. 3, No. 1816.

Feb. 26, 1831. The testator died, and was buried at Hendon.

Apr. 30, 1831. Elizabeth Mary Ford, widow of the testator, John Ford, died, and was buried at Twickenham, Middlesex.

Dec. 2, 1816. By a decree made in a cause wherein Francis D'Arcy Ford, Dame Maria Thompson, wife of Sir William Thompson, Bart., by the said Francis D'Arcy Ford, her brother and next friend, Georgiana Frances Amy Thompson, William Ford Thompson, D'Arcy Thompson, Anna Maria Thompson, Clara Thompson, and Arthur Luke Thompson, infants, by the said Francis D'Arcy Ford, their uncle and next friend, are plaintiffs, and John William Ford and Charles Anster, defendants,

It was ordered, that the bill be dismissed against the defendant, Charles Anster, with costs, and the defendant, John William Ford, by his answer admitting the will of John Ford, the testator in the pleadings named, It was declared, that the same ought to be established, and the trusts thereof performed; And it was ordered and decreed accordingly.

And the plaintiff, Francis D'Arcy Ford, submitting to account, It was ordered, that it be referred to Master Harvey, to take an account of the personal estate, debts, &c., of the said testator; And that the personal estate be applied in payment of his debts, funeral expenses, and legacies; And that the said Master inquire whether there was any part of the said testator's estate now remaining outstanding and incapable of being got in; And whether it would be for the benefit of Lady Thompson (Maria) and her children, that the defendant, John William Ford, should purchase certain household furniture and effects; And to inquire what real estates the said testator was entitled to at the

Dec. 2, 1816. time of his death, and for what estates and interests, and to take an account of the rents and profits; And to inquire whether there is any timber upon the said testator's real estates proper to be cut down; And in case, upon taking the account of the personal estate, he should find that the same was not sufficient for the payment of debts, funeral expenses, and legacies, then to state to the Court what part of the said testator's real estate it would be advisable should be sold to make up such deficiency; And he was to be at liberty, from time to time, to make a separate report or reports, and any of the said parties should be at liberty to apply.

Jul. 3, 1818. The said Master, by his report, (after stating the amount of the receipts and payments by the executors, and the amount of the testator's debts), found that the said personal estate was greatly insufficient to pay the said testator's debts and legacies; And he was of opinion that it would be for the benefit of the several parties interested in the said testator's estates, that the houses, buildings, and pieces of land which lay detached from the mansion-house at Layton, and grounds belonging thereto, should be sold to make up the deficiency; and in the second schedule to his report he had set forth a short description of the said premises proposed to be sold.

The First Schedule to which the report refers, contains the particulars of the debts due from the estate of the said testator, and of the legacies given by his will remaining unsatisfied.

The Second Schedule to which the report refers, containing a description of the estates proper to be sold, and amongst the rest,

An Estate, situate at Layton, in the county of Middlesex, consisting of the following particulars:

	A.	R.	P.
A newly erected house, barns, stables, yards, and garden . . .	1	0	10
Red Field (alias, Scott's Field) . .	8	2	0
Little Red Field	3	0	36
Brown's Close, next Freeman's . .	7	2	36
Upper Church Field . . .	6	2	2
Freeman's Field	9	3	36
Carried forward .	37	0	0

Jul. 3, 1818.

	A.	R.	P.
Brought forward	37	0	0
Dove Croft	1	3	37
New Inclosure	7	2	19
Ditto	8	2	21
Containing in the whole .	A. 55	0	37

In the occupation of Joseph Edwards, Esq., at the yearly rent of £300.

(This schedule does not contain any other part of the estates comprised in the present abstract).

Jul. 4, 1818. By an Order made in the said cause, It was ordered, that the said Master's report be confirmed; And that the several estates mentioned in the second schedule to the said report be sold, with the approbation of the said Master, to the best purchaser, in which sale all proper parties should join and produce all deeds, &c.; And that the monies to arise by such sale should be paid into the Bank in the name of the Accountant-General, and be laid out in the Three per Cents, in his name, in trust in the said cause.

Jul. 8, 1818. Emily Thompson, another child of Sir William and Lady Thompson, was born. She was baptized at Croydon, Surrey.

Feb. 2, 1822. Decree on supplemental bill sets forth the birth of the said Emily Thompson, and decrees that she shall have the same benefit of the original bill as if she had been born before and made a party thereto.

Mar. 1, 1821. By a Deed Poll, under the hand and seal of the said Charles Anster,

Reciting the before abstracted will and codicil of the said John Ford and his death;

And reciting, that the said Charles Anster had never accepted the office of trustee given to him by the said codicil, or the devise and bequest implied by his nomination as trustee therein, nor had he ever acted or intended to act in the trusts of the said will.

It was witnessed, that the said Charles Anster did thereby absolutely renounce and disclaim

All and singular the lands, tenements, and hereditaments, goods, chattels, and real and personal

Mar. 1, 1821. estates of or belonging or late belonging to the said John Ford, deceased, devised and bequeathed in and by his said will and codicil, or either of them, and the devise thereof in the said codicil contained or implied, and the office of trustee by the said codicil given or intended to be given to him the said Charles Anster, and all right, &c.
Executed by the said Charles Anster, and attested.
Registered 27th May, 1824, C. 2, No. 1312.

Jul. 3, 1821. By an Order on further direction made in the said cause, after noticing the sale of part of the real estates; It was ordered, that a partition should be made of all the freehold and copyhold estates of which the said John Ford died seised or possessed then remaining unsold, and that a commission should issue for that purpose, directed to certain commissioners to be therein named, to divide the same into three equal parts, and that one third part thereof should be allotted as the share of the said defendant, Francis D'Arcy Ford; one other third part thereof as the share of the said John William Ford; and the remaining third part thereof should be allotted unto the said Francis D'Arcy Ford and John William Ford, upon the trusts, &c., and subject to the contingencies in the said testator's will expressed concerning the remaining third part, and that the respective shares should be holden in severalty; and that after such partition should have been made, all proper persons should execute such conveyances as should be necessary for conveying the several shares so to be allotted to the parties to whom the same should respectively belong, to hold the same in severalty.

Sept. 5, 1821. Westminster, 5 Sept., 2nd Geo. 4. By a Commission made in the said cause, directed to Barnard Cranstoun Cocker, John Addison, William Pole Attfield, and Francis Giles, gentlemen;

After reciting the lastly before abstracted order,

It was made known, that the king did give full power and authority unto them, or any three or two of them, to survey the estates in question in the said order and pleadings of the said cause mentioned, and according to the best of their skill, knowledge, and judgment, make a fair partition, division, and allotment thereof; and the same separate, set apart, and divide into three equal parts, and allot and appoint one third part thereof as and for the share of the complainant, Francis D'Arcy Ford,

Sept. 5, 1821. and one other third part thereof as and for the share of the defendant, John William Ford, and the remaining third part thereof unto the said Francis D'Arcy Ford and John William Ford, their heirs, executors, administrators, and assigns, upon the trusts, &c., and subject to the contingencies in the said will expressed concerning the remaining third part; the said respective shares to be held in severalty; and the parts so divided to distinguish and separate by certain metes and bounds; and to return unto the said Court of Chancery their facts and proceedings in the premises by their certificate, fairly written on parchment, together with depositions and interrogations, closed up under the seals of them, or any three or two of them.

Mar. 3, 1822. By a Certificate of this date under the hands and seals of the said William Pole Attfield, and Francis Giles, the acting commissioners in the said commission, it was certified that they, the said William Pole Attfield, and Francis Giles, had surveyed the estate in question, in the order and pleadings of the said cause mentioned; and had, according to the best of their skill, knowledge, and judgment, made a fair partition, direction, and allotment thereof, and had separated, set apart, and divided the same into three equal parts, as by the said commission was directed, and had allotted and appointed, and did thereby allot and appoint unto the said John William Ford, (inter alia),

All that capital messuage or mansion-house, with the outhouses, barns, stables, yards, orchards, gardens, and appurtenances, called the Manor Farm, situate in Layton aforesaid, in the tenure or occupation of the defendant, John William Ford, and the site of which mansion-house, yards, gardens, and orchard contained by estimation 1a. 0r. 10p., or thereabouts; And all those several closes, pieces, or parcels of land, arable, meadow, pasture, and wood, situate in Layton aforesaid, commonly called the Manor Farm, that is to say, All that close, piece, or parcel of arable, meadow, or pasture land, commonly called the Thither and Farther Home Fields, and small close, containing by estimation 5a. 1r. 3p., bounded on the north, in part by Hendon Watch estate, in part by Church Meadow, and in part by Manor House Garden and Farm; on the south, in part by Pond Field, otherwise Pound

Mar. 3, 1822. Field, and in part by Four Acres; and on the west, by Three Corner Field, and Six Acres,

As and for the share of the said John William Ford, which third part or share so allotted and appointed to the said John William Ford is comprised in that part of the map or plan thereunto annexed, which is distinguished by a blue tint or shade encircling the same, and is marked No. 3. And they further allotted and apportioned unto the said John William Ford, All the timber and timber-like trees, underwood, and fallers then being on that part of the lands and premises thereinbefore to him allotted and apportioned.

And they further certified that the said partitions and divisions were in due proportions, &c.

Executed by the said William Pole Attfield and Francis Giles, and attested by two witnesses.

Mar. 9, 1822. The said Certificate was absolutely confirmed by an Order of the said Court of Chancery.

Jun. 2, 1822. 3 Geo. 4. By an Act of Parliament intituled "An Act for Carrying into Effect a Partition of Real Estates devised by the Will of John Ford, Esq., and other Purposes relating to such Estates,"

Reciting as in the said act is recited, a printed copy of which accompanies this abstract,

It is enacted, that the said partition and allotments of the freehold and copyhold estates described in the said certificate of partition, (being the estates comprised in the three schedules to that act), should be and were thereby established, ratified, and confirmed.

And that all the said freehold and copyhold messuages, farms, lands, tenements, and hereditaments which in and by the aforesaid certificate were expressed to be thereby allotted to the said John William Ford, as and for his part or share in severalty of the estates directed by the said Court of Chancery to be divided as aforesaid, which estates and premises are particularly described in the third schedule to the said act, with their appurtenances, should be vested in and stand settled and assured upon and to the use of Richard Cooper the younger, his heirs and assigns, for ever, In trust for the said John William Ford, his heirs and assigns, for ever.

Jun. 2,
1822. Proviso, That no person not being tenant to the lord should by virtue of that act only become tenant of the said copyhold premises without an admission thereto by the lord of the manor, so as to entitle the lord to all such fines, &c., as he would have been entitled to if that act had not passed; and that it should be lawful for any person who had any legal estate in the copyhold hereditaments thereby settled, to make any surrender or customary assurance of the same, To the uses and for the purposes of that act, notwithstanding the limitations, trusts, or dispositions of the said will and codicil.

The usual saving clause,

And that the act should be printed by the King's printer, and a copy thereof so printed should be admitted as evidence by all judges, &c.

The third Schedule to which the act refers [being the allotments to the said John William Ford] contains, (inter alia),

	A.	R.	P.
Manor House yards and farms .	1	0	10
Manor House plantation (copyhold) .	0	3	23
Further Home Field, Hither Home Field, and Small Close . . .	5	1	3
Timber and timber-like trees.			

Aug.
4 & 5, Indentures of lease and release of these dates, &c.]
1822.

[3. Abstract *of the* Title *of* Richard Thorpe, *to a* Messuage *or* Tenement, *with Outbuildings, Garden, and Allotment of Land, situate at* Stoke, *in the Parish of* Cayfield, *in the County of* Northampton, *held of the Manor of* Cayfield, *in the said County.*

Oct. 2, 1782. WILL of Richard Thorp, and Susan Thorp, of the Parish of Cayfield, and county of Northampton, whereby they devised

Oct. 2, 1782. ratified and confirmed, unto their son Thomas Thorp, during his life,

All that copyhold messuage, lands, and tenements, with the appurtenances, situate in Stoke, in the Parish of Cayfield and county of Northampton, and then in their possession;

Remainder to their grandson John Thorp, for life;
Remainder to their grandson George Field, for life;
Remainder to their grandson William Field, for life;
And after his death, if there were any heirs of John Thorp alive lawfully begotten by him, Their will was that it should descend to the heir of their grandson John Thorp; but for want of such heir of John Thorp, Then they gave and devised the aforesaid copyhold estate, land, and premises to the heirs of George and William Field, that is, to them and their heirs for ever.
And the said testator and testatrix appointed their son Thomas Thorp, their sole executor.

Executed by testator and testatrix, and attested by two witnesses.
Proved by the executor in the Prerogative Court of Canterbury, 30th March, 1785.

(The homage, at a Court held 29th May, 1838, presented the Probate of this Will as part of their verdict, of which a memorandum signed by the homage is indorsed on the Probate).

Oct. 7, 1785. At a Court Leet and General Court Baron came Thomas Thorp, son and devisee of Susan Thorp, by Charles Keene, his attorney lawfully appointed, and prayed to be admitted tenant to

One cottage, in Stoke, with the appurtenances, which came into the hands of the lord of the said manor

Oct. 7, 1785. by the surrender, last will, and death of his said mother, Susan Thorp;

To whom the lord of the said manor, by his steward, gave seisin thereof by the rod;

To hold to him during his life, with remainders over, pursuant to the Will of his said late mother, confirmed by his father, Richard Thorp, deceased, at the will of the lord, according to the custom of the said manor, by the rent and other services thereof, due and of right accustomed.

Fine, 5*l.* 1*s.*; Heriot, 6*d*; Rent, 6½*d.*

And he was admitted tenant.

Jul. 4, 1794. Will of Thomas Thorp, as follows: "1794. The last will and testament of Thomas Thorp, No. 24, Curzon Street, in the parish of St. George, Hanover Square. I, Thomas Thorp, being in perfect health and sound judgment, do make George Field, my neveau, my attorney, to act for me at my decease. I give to John Thorp," (inter alia), "the house and tenement, land, and all belonging to it in, at Stoke, in the parish of Cayfield, in the county of Berks, according to the Will of my mother, Susan Thorp." (He then bequeaths certain pecuniary legacies, and proceeds further as follows:) "All the rest goods, chattels, cloaths, &c., that I possess at my decease to the said George Field.

Given under my hand and seal, this 24th day of July, 1794. Thomas Thorp" (seal). "Signed and sealed in the presence of" (no witnesses).

Handwriting of testator proved by oath of two witnesses, viz. Jane Gray, widow, and William King, Esq.

Mar. 12, 1796. Will proved by George Field, the testator's nephew, and executor according to the tenor of the will; William Field, nephew also of the deceased, and, together with the said George Field, the only next of kin of the said deceased, and the only persons who would have been entitled to

Mar. 12, 1796. his personal estate in case he had died intestate, first consenting.

May 2, 1797. At a Court Leet and General Court Baron came George Field, by James Stone, his attorney, lawfully appointed, and prayed to be admitted tenant to

A copyhold cottage, with the appurtenances, within the manor of Cayfield, in the county of Northampton, which came into the hands of the lord of the said manor by the death of Thomas Thorp, his late uncle,

To whom the lord of the said manor, by his steward, gave seisin thereof by the rod,

To hold to him and his heirs for ever, at the will of the lord, according to the custom of the said manor, by the rent and other services theretofore due and of right accustomed.

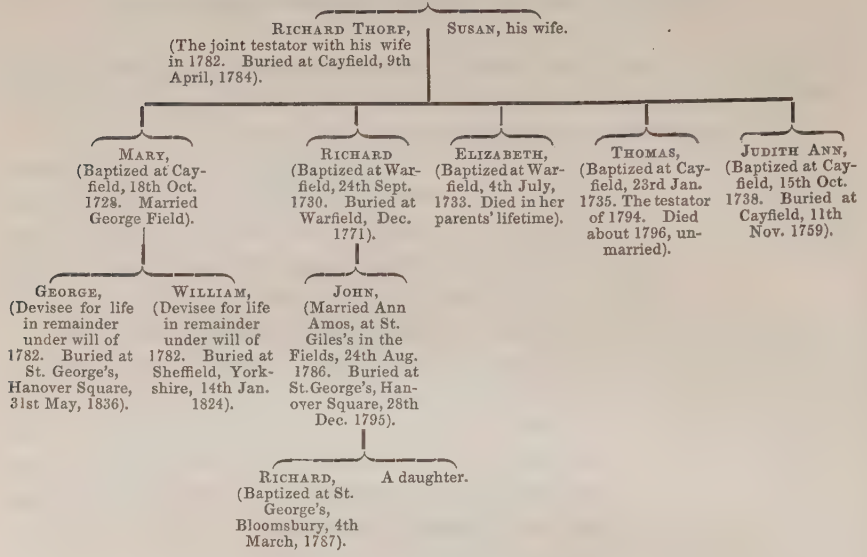
Fine, £8; Heriot, beast; Rent, 6½*d.*; Fealty respited.

And he was admitted tenant.

By a memorandum at foot of copy admission it is stated that surrender to will was inrolled.

Oct. 1, 1801. Counterpart (expired) Lease, whereby the said George Field demised the said premises to James Woods, for twenty-one years, determinable at seven or fourteen years, at £8 rent.

PEDIGREE OF THE PRESENT RICHARD THORPE.


Richard Thorp, (The joint testator with his wife in 1782. Buried at Cayfield, 9th April, 1784).
Susan, his wife.
Mary, (Baptized at Cayfield, 18th Oct. 1728. Married George Field).
Richard (Baptized at Warfield, 24th Sept. 1730. Buried at Warfield, Dec. 1771).
Elizabeth, (Baptized at Warfield, 4th July, 1733. Died in her parents' lifetime).
Thomas, (Baptized at Cayfield, 23rd Jan. 1735. The testator of 1794. Died about 1796, unmarried).
Judith Ann, (Baptized at Cayfield, 15th Oct. 1738. Buried at Cayfield, 11th Nov. 1759).
George, (Devisee for life in remainder under will of 1782. Buried at St. George's, Hanover Square, 31st May, 1836).
William, (Devisee for life in remainder under will of 1782. Buried at Sheffield, Yorkshire, 14th Jan. 1824).
John, (Married Ann Amos, at St. Giles's in the Fields, 24th Aug. 1786. Buried at St. George's, Hanover Square, 28th Dec. 1795).
Richard, (Baptized at St. George's, Bloomsbury, 4th March, 1787).
A daughter.

May 2, 1838. Declaration of Elizabeth Waters as follows:—"I, Elizabeth Waters, of the parish of Sudworth, in the county of Northampton, widow, do solemnly declare, that I well knew Richard Thorpe and Susan his wife, who many years since resided at that part of Oldford which is in the parish of Cayfield, in the said county of Northampton, That the said Richard Thorpe died and was buried at Cayfield aforesaid, in or about the year one thousand seven hundred and eighty-four, leaving the said Susan his wife widow, and two children him surviving, namely, Mary the wife of George Field, and Thomas Thorpe. That the said Richard Thorpe and Susan his wife had another son named Richard (who was their eldest son), and who died in their lifetime, namely, about the year one thousand seven hundred and seventy-one, leaving an only son, named John. And I further declare, that I well knew the said John Thorpe, and that he lived some years after his father died, with his grandfather and grandmother, the said Richard Thorpe and Susan his wife, at Oldford aforesaid, and was frequently called and known as grandson John; that he said John afterwards lived in the service of the late General James Smith, at Bekedale, near Sandhurst, as a helper in the stables; And I verily believe that he

May 2, 1838. was the same person who is named as devisee in the will of the said first named Richard Thorpe and Susan his wife, dated the second day of October, one thousand seven hundred and eighty-two, and described as their grandson John Thorpe, and that he was the same John Thorpe who is named as a devisee in the will of his uncle Thomas Thorpe, dated the fourth day of July, one thousand seven hundred and ninety-four. That the said Thomas Thorp lived many years in the service of the said General James Smith, at Bekedale aforesaid, and died in or about the year one thousand seven hundred and ninety-six, unmarried and without issue. And I further declare, that I have been informed, and verily believe, that the said John Thorpe married one Ann Amos, and that he was drowned in the river Cam in or about the year one thousand seven hundred and ninety-five, leaving lawful issue, namely, a son, named Richard, (who is now living in Bishopsgate Street, in the city of London, and carrying on the trade of a Jeweller there), and one daughter; And I verily believe that the said last-named Richard is the great grandson and heir at law of the said first-named Richard Thorpe and Susan his wife, and the son and heir of the said John Thorpe, the devisee named in their aforesaid will; and I make this declaration, &c. (Signed) E. Waters. Declared at Cayfield, in the county of Northampton, this twenty-first day of May, 1838, before me, John Brown, a Master extraordinary in Chancery."

May 9, 1838. At a special Court Baron came the said Richard Thorpe the younger, (described as of Bishopsgate Street, in the city of London, gentleman), in his own proper person, and prayed to be admitted tenant to

All that messuage or tenement, with the barn, stable, outhouses, yard, garden, and appurtenances, situate at Stoke, in the parish of Cayfield, then in the occupation of Jane Thomas, (which premises came into the hand of the lord of this manor upon the death of George Field, and to which he was admitted tenant upon the 29th day of March, 1797, by the description of a copyhold cottage with the appurtenances,

May 9, 1838. within the manor of Cayfield, in the county of Northampton.

And also to one parcel of land, situate on Clerkwell Common, containing two roods, and three perches bounded by the private road, No. 14, and allotments to Robert Allcash and Thomas Dunn respectively, (which lastly described premises were allotted to the said George Field in and by the award made upon the inclosure of the parish of Cayfield, bearing date the 4th day of May, 1816, in respect of his copyhold estate, and came into the hands of the lord of this manor upon his decease).

To which said Richard Thorpe, the lord, by his steward, gave seisin thereof by the rod,

To hold to him the said Richard Thorpe, his heirs and assigns for ever, of the lord, at the will of the lord, according to the custom of this manor, by the rent and other services theretofore due and of right accustomed.

Fine, £22; Heriot, beast; for want, 1*s.* 1*d.*; Rent, 6½*d.*

Fealty respited.

And he was admitted tenant.]

[4. **Abstract** *of the* Title *of* Mr. Thomas Wylde, *of* Cheapside, *in the City of* London, *Cabinet Maker, to a* Leasehold House *and Premises, in* Queen Street, *in the Parish of* St. Dunstan in the East, London.

Dec. 6, 1734. Indenture of Lease between William Watts the elder, and William Watts the younger, son and heir apparent of said William Watts the elder, of the first part, Robert Good of the second part, John Taylor and James Brindall (administrators of

Dec. 6,
1734. all the goods, chattels, rights, and credits, of Robert Tudor, late citizen and builder of London, deceased), of the third part, and James Head of the fourth part; whereby, for the considerations therein mentioned,

Said Good, by the direction and appointment of said Watts the elder, and Watts the younger, and by the direction and appointment of said Taylor and Brindall, and also said Watts the elder, Did demise, lease, and to farm let unto said Head, his executors, administrators and assigns,

All that piece or parcel of ground situate, lying and being on the west side of a new street, called or designed to be called Queen Street, lying on the south side of King Street, in the parish of Saint Dunstan in the East, London, containing in front next Queen Street aforesaid, from north to south, 16 feet and 1 inch of assize; in the rear or back part thereof, from north to south, 61 feet and 3 inches of assize; and in depth on the north side, from east to west, 44 feet of assize; then turning northward 8 feet and 6 inches of assize; and from thence extending westward to the rear or back part of the said piece or parcel of ground 40 feet of assize; and in depth on the south side, from east to west, 85 feet and 9 inches of assize; then turning southward 10 feet and 2 inches of assize; and from thence extending westward to the rear or back part of the said ground 3 feet and 9 inches of assize; and which said piece or parcel of ground doth abut east on Queen Street aforesaid, west on other ground of him the said William Watts the elder, north on ground built or intended to be built on by him, the said James Head, and Issac Lewis, and is more particularly mentioned and described in the plan or ground plot thereof, drawn and delineated in the margin of the now abstracting indenture. Together with the said brick messuage or tenement lately erected and built on part of the said piece or parcel of ground, and all other erections and buildings now erected and built or to be erected and built upon the said piece or parcel of ground, or any part thereof, Together also with all ways, &c.,

Dec. 6, 1734. To HOLD the same, with their appurtenances, unto the said Head, his executors, administrators, and assigns, from the Feast day of St. Michael the Archangel, which was in the year 1732, for the term of ninty-nine years from thence next ensuing, at the rent of one peppercorn for the first two years and three quarters of a year, and at the yearly rent of 3*l.* 16*s.* for the remaining ninety-six years and one quarter of a year, payable quarterly.

COVENANTS by said Head with said Good, to pay rent, to build said messuages, to insure in Hand-in-Hand or Westminster Insurance Office, to the highest value said offices commonly insure on houses; to repair, &c.; to leave, &c., at end of term; that lessors may enter and view said premises and give three months' notice of wants of repair; to repair accordingly; and not to let, &c., to a victualler, without license of said Watts the elder.

PROVISO for re-entry on non-payment of rent.

COVENANTS by said Watts the elder, that he or said Good had right to demise and lease; and for quiet enjoyment.

COVENANT by said Good for quiet enjoyment.

RECITING, that said Watts the elder had contracted with said Tudor to erect a common sewer, and

RECITING, that in order to exempt said Head from paying towards repairing, &c., said sewer, said Watts the elder had agreed to accept 2*s.* 6*d.* by the year;

IT IS FURTHER WITNESSED, that for the considerations mentioned said Head agreed to pay said Watts the elder said sum of 2*s.* 6*d.* yearly, and that same should be chargeable on said premises in the way of rent.

COVENANTS by said Watts the elder, to pay for repairs and aforesaid sewer, and to keep indemnified said Head.

COVENANTS by said Head with said Good, that no inlet into said sewer should be made, and that Commissioners of Sewers might enter, (they making good all damage).

EXECUTED by said Watts the elder, Watts the younger, Good, Taylor, and Brindall, and attested.

JUL. 1, 1735. INDENTURE OF MORTGAGE between said Head of the one part, and said Taylor of the other part.

RECITING the before abstracted indenture of lease.

IT WAS WITNESSED, that in consideration of the sum of £150,

JULY 1, 1735. said Head did grant, bargain, sell, assign, and set over unto said Taylor, his executors, administrators, and assigns,

THE said indenture of lease;

ALL said premises;

AND all the estate, &c.;

TO HOLD unto said Taylor, his executors, administrators, and assigns, from thenceforth for residue of said term of ninety-nine years.

PROVISO for redemption on payment of principal and interest on 12th January then next.

COVENANTS for payment of principal and interest, and for the title, &c.

EXECUTED by said Head, and attested.

RECEIPT for consideration endorsed.

DEC. 2, 1735. DEED POLL, endorsed on last abstracted indenture;

RECITING that within mentioned principal sum was owing, with 3*l.* 6*s.* for the interest thereof;

The said Taylor, in consideration of 153*l.* 6*s.*, paid by George Balls, did bargain, sell, assign, transfer, and set over unto said George Balls, his executors, administrators, and assigns,

THE SAID INDENTURE of lease and indenture of mortgage, and

THE aforesaid Premises, principal and interest,

AND all his estate, &c.

TO HOLD unto said Balls, his executors, administrators, and assigns, from thenceforth for remainder of said term of ninety-nine years.

Subject to right of redemption by said Head.

COVENANT by said Taylor, that he had done no act to incumber.

EXECUTED and attested,

RECEIPT for consideration signed and attested.

NOV. 7, 1739. INDENTURE OF ASSIGNMENT, BETWEEN said Balls of the first part, said Head of the second part, and Jean Parsons of the third part;

RECITING the before abstracted indentures of lease and mortgage, and the before abstracted deed poll;

RECITING, that the principal sum of £150 was then owing to said Balls, together with 32*l.* 14*s.* 9*d.* for the interest thereof;

Nov. 7,
1739. It was witnessed, that in consideration of 182*l.* 14*s.* 9*d.* to said Balls paid by said Parsons, (by the direction and appointment of said Head, testified, &c.), And also in consideration of 17*l.* 5*s.* 3*d.* to said Head paid by said Parsons and Balls, (by the direction and appointment of said Head, testified as aforesaid), Did bargain, sell, assign, and set over, and said Head did fully and absolutely bargain, sell, assign, set over, release, ratify and confirm unto said Parsons, her executors, administrators, and assigns, as well

The thereinbefore recited Indentures of lease and mortgage, and deed poll, as

The said Premises,

And all the estate, &c.,

To hold with their and every of their appurtenances, unto said Parsons, her executors, administrators, and assigns, from thenceforth for the remainder of the said term of ninety-nine years.

Covenant by said Balls, that he had done no act to incumber.

Covenants by said Head that lease was valid; that said Balls and Head, or one of them, had full power to assign; for quiet enjoyment, free from incumbrances; and for further assurance.

Executed by said Balls and Head and attested.

Receipts for respective considerations indorsed.]

ACKNOWLEDGMENT.

PRELIMINARY REMARKS.

ACKNOWLEDGMENT BY MARRIED WOMEN.

Stat. 3 & 4 Will. 4, c. 74.

[THE clauses in the act for the abolition of fines and recoveries (3 & 4 Will. 4, c. 74), which relate to the acknowledgment of deeds executed by married women, are as follow:—

ACKNOWLEDGMENT OF DEEDS.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a Judge, &c.

Sect. 79. "That every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a Judge of one of the superior courts at Westminster, or a Master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided."

SEPARATE EXAMINATION.

The Judge, &c. before receiving such acknowledgment, to examine her apart from her husband.

Sect. 80. "That such Judge, Master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consent to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void."

As to the appointment of

Sect. 81. "That, for the purpose of providing convenient means of taking the acknowledgments by married women of the deeds to

ACKNOWLEDGMENT BY MARRIED WOMEN.

be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time, made out for that county, riding, division, soke, or place, and such officer shall deliver a copy, signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace, for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same."

perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

Sect. 82, provides, "That any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be."

Power of perpetual commissioners not confined to any particular place.

Sect. 83. "That in those cases where, by reason of residence beyond seas (*a*), or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a Judge or a Master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any Judge of that court, to issue a commission specially appoint-

If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

(*a*) [As to the construction of the words "beyond seas" in acts passed since the union with Ireland see *Battersby* v. *Kirk*, 3 Scott, 11. And see *ante*, p. 15. An affidavit made in Ireland must be sworn before a commissioner appointed (under the statute 3 & 4 Will. 4, c. 42, s. 42) for taking affidavits in the Court of Common Pleas in England. *In re Anderson*, 2 Scott, 626: *Rogers* v. *Fry*, 4 Dowl. P. C. 641.]

ing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said Court or Judge shall think fit."

ACKNOWLEDGMENT BY MARRIED WOMEN.

MEMORANDUM AND CERTIFICATE OF ACKNOWLEDGMENT.

Sect. 84. "That when a married woman shall acknowledge any such deed as aforesaid, the Judge, Master in Chancery, or commissioners taking such acknowledgment, shall sign a memorandum, to be endorsed on or written at the foot or in the margin of such deed, which memorandum subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect: *videlicet*—

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned;

'This deed, marked [*here add some letter or other mark for the purpose of identification*], was this day produced before me [*or* us], and acknowledged by therein named, to be her act and deed; previous to which acknowledgment the said was examined by me [*or* us] separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her.'

"And the same Judge, Master in Chancery, or commissioners, shall also sign a certificate of the taking of such acknowledgment, to be written or engrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect: *videlicet*—

and also sign a certificate of the taking of such acknowledgment to the effect here mentioned.

'These are to certify, that on the —— day of ——, in the year one thousand eight hundred and ——, before me, the undersigned Sir *Nicholas Conyngham Tindal*, Lord Chief Justice of the Court of Common Pleas at Westminster [*or* before me Sir *James Parke*, knight, one of the justices of the Court of King's Bench at Westminster; *or* before me the undersigned *James William Farrar*, one of the Masters in ordinary of the Court of Chancery; *or* before us *A. B.* and *C. D.*, two of the perpetual commissioners appointed for the ——, for taking the acknowledgments of deeds by married women, pursuant to an act passed in the —— year of the reign of his Majesty King William the Fourth, intituled An Act [*insert the title of this act* (*a*)]; *or* before us the undersigned

(*a*) [The title is "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance."]

ACKNOWLEDGMENT BY MARRIED WOMEN.

'*A. B.* and *C. D.*, two of the commissioners specially appointed, 'pursuant to an act passed in the —— year of the reign of his 'Majesty King William the Fourth, intituled An Act [*insert the 'title of this act*] for taking the acknowledgment of any deed by '—— the wife of ——, appeared personally —— the wife of ——, 'and produced a certain indenture, marked [*here add the mark*] 'bearing date the —— day of ——, and made between [*insert the 'name of the parties*], and acknowledged the same to be her act 'and deed: and I [*or* we] do hereby certify that the said —— 'was, at the time of her acknowledging the said deed, of full age (*a*) 'and competent understanding, and that she was examined by me '[*or* us], apart from her husband, touching her knowledge of the 'contents of the said deed, and that she freely and voluntarily con-'sented to the same.'

Certificate with affidavit verifying the same to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the Court.

Sect. 85. "That every such certificate as aforesaid of the taking of an acknowledgment of a married woman of any such deed as aforesaid, together with (*b*) an affidavit by some person verifying the same (*c*), and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some Judge or Master in Chancery, or by two commissioners, appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas."

(*a*) [Where a conveyance was directed to be made by an infant trustee, who was a married woman, under the authority of the stat. 11 Geo. 4 & 1 Will. 4, c. 104, the Court of Common Pleas allowed the certificate to be made without the words "of full age." *Re Leake*, 1 Scott, 80. But generally, the certificate will not be filed without a positive affidavit that the wife is of full age. *Re Coverley*, 8 Scott, 147.]

(*b*) [The affidavit may be filed subsequently to the filing of the certificate. *Anon.*, 1 Scott, 52.]

(*c*) [A British consul has authority by the 6 Geo. 4, c. 87, s. 20, to certify as to the handwriting and authority of the party before whom the affidavit verifying the certificate is sworn; *Re Barber*, 2 Scott, 436; but the affidavit must be sworn before a native Court. *Re Eady*, 6 Dowl. P. C. 615; and needs not be signed by the deponent, if it is not the practice of the country to require such signature. *Re Birch*, 6 Scott, 185. See also *Ex parte Mann*, 7 Scott, 142; and cases cited in reporter's note; and see *Re Shufflebotham*, 6 Scott, 898.]

ACKNOWLEDGMENT BY MARRIED WOMEN.

Sect. 86. "That when the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment."

On filing certificate, the deed, by relation, to take effect from time of acknowledgment.

Sect. 87. "That the officer of the Court of Common Pleas, with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient; and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed."

The officer with whom the certificates are lodged to make an index of the same.

Sect. 88. "That, after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer."

Officer to deliver a copy of certificate filed which shall be evidence.

POWER OF THE COURT OF COMMON PLEAS.

Sect. 89. "That the Lord Chief Justice of the Court of Common Pleas at Westminster, shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure, and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said Court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this act to be had, done,

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the Court to make orders touching the examination, memorandums, certificates, affidavits, &c.

ACKNOWLEDGMENT BY MARRIED WOMEN.

and executed for completing and giving effect to such acknowledgments and examinations."

EQUITABLE INTERESTS IN COPYHOLDS.

A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

Sect. 90. "That, in every case in which a husband and wife shall either in or out of court, surrender into the hands of the lord of a manor any lands held by copy of Court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid."

DISPENSATION WITH HUSBAND'S CONCURRENCE.

Court of Common Pleas in the case of a husband being lunatic, &c., may dispense with his concurrence, except where the Lord Chancellor or other persons intrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

Sect. 91, provides, "That, if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause (*a*) be incapable of executing a deed, or of making a surrender of lands held by copy of Court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet (*b*), to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise, and all acts, deeds, or surrenders

(*a*) [Where the parties had been married in 1829, and after living together seventeen weeks, the husband went away and could not be discovered after diligent inquiry, the Court granted an order for dispensing with his concurrence. *Anon.*, 2 Jurist, 945. In *Ex parte Gill*, 1 Bing. N. C. 168, leave was granted upon an affidavit, that the husband had absconded in 1831, after committing an act of bankruptcy; had never been heard of since, but was believed to be in America.]

(*b*) [See *Ex parte Thomas*, 4 M. & Sc. 331: *Ex parte Shuttleworth*, Id. 332, n.: *Ex parte Bates*, 4 Scott, 396.]

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to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred (*a*): Provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, lord keeper, or lords commissioners for the custody of the Great Seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband."]

[The Court of Common Pleas, in pursuance of the authority contained in the 89th section of the act, in Michaelmas Term, 1833, framed and published some rules (*b*), which were revoked by the following rules of Hilary term, 1834]:—

Reg. Gen. Mich. T. 1833.

(*a*) [The 77th section provides, that the act shall not extend to the copyholds of a married woman in cases where the feme might effect the object by surrender *with the concurrence of her husband*: but it has been decided, that the 91st section overrides the 77th, and authorises the Court to dispense with the husband's concurrence in respect of copyholds as well as of freeholds. *Re Shirley*, 7 Scott, 174.]

(*b*) [These rules are as follow, and apply to transactions up to the 1st of March, 1834. "Whereas by the 84th section of the statute made in the third and fourth years of the reign of his present Majesty, chapter 74, intituled 'An Act for the Abolition of Fines and Recoveries and for the substitution of more Simple Modes of Assurance,' the Court of Common Pleas is authorised from time to time to make alterations in the memorandums and certificates in the said section mentioned.

"And whereas, by the 89th section of the said act, it is enacted, that the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as in the said act are mentioned shall for the time being be lodged, and may remove him at pleasure; and that the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the said Court shall think fit, touching the mode of examination to be pursued by the commissioners to be appointed under the said act, and touching the particular matters to be mentioned in such memorandums and certificates as therein mentioned, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place. Now it is ordered, that in addition to the form of the certificate mentioned in the 84th section of the said act, after stating the names of the parties and the words 'and acknowledge the same to be her act and deed,' the following words should be inserted: 'And I (or we) do further certify, that the several premises comprised in the said indenture are situate in the parish or several

ACKNOWLEDGMENT BY MARRIED WOMEN.

"WHEREAS it has been found expedient to make alterations in the general rules made in Michaelmas Term last by this Court, for

Reg. Gen. Mich. T. 1833.

parishes and place or places following, that is to say, in the parishes of ——, (as the case may be) in the county of ——.'

"And it is further ordered, that where the acknowledgments shall be made before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any of the parties in the transaction giving occasion to the taking such acknowledgment; and that in the affidavit verifying the certificate, it shall be deposed, in addition to the verification thereof, that one or more of the persons making such affidavit knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment the person or persons making the same was or were of full age and competent understanding, and that one at least of the commissioners taking such acknowledgment is not the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any of the said parties, and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be mentioned in such affidavit.

"And it is further ordered, that the commissioners do inquire of married women whether they intend to give up their interest in the estate to be passed by such deed, without having any provision made for them in return for or in consequence of their so giving up such interest; and if it appears that any provision is to be made for any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been actually made; and one of the said commissioners shall state in the affidavit so to be made as aforesaid, that such inquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made, that he the said commissioner is satisfied that the same has been made, and where such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

"And it is hereby further ordered, that the affidavits verifying such certificate, where the acknowledgment is taken by a Judge or Master in Chancery, be in the form hereunto annexed marked (A), and where before any of the commissioners appointed in pursuance of the said act, in the form hereunto annexed marked (B), with such variations only as the circumstances of the case shall render necessary.

"And it is hereby further ordered, that the certificates and the affidavits verifying the same shall be delivered to the officer to be so appointed within one month from the making the acknowledgment, and that the officer shall not receive the same after that time, without the direction of the Court or a Judge.

N. C. TINDAL.
S. GASELEE.
J. B. BOSANQUET.
E. H. ALDERSON."

(A.)

"FORM OF AFFIDAVIT, *verifying the Certificate, where the acknowledgment is taken before a Judge or Master in Chancery.*

A , of , maketh oath and saith, That he knows the wife of , in the certificate hereunto annexed mentioned: And that the acknowledgment therein mentioned was made by the said , and the said certificate signed by the said , [*Judge or Master*], therein

ACKNOWLEDGMENT BY MARRIED WOMEN.

Reg. Gen. Hil. T. 1834.

the purpose of carrying into effect the statute passed in the 3rd and 4th years of the reign of his present Majesty, cap. 74, intituled, 'An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance.'

"And whereas it is necessary to make orders touching the amount of the reasonable fees and charges to be taken by the several persons appointed to carry the powers of the said act into execution: and it will be convenient that all the orders and regulations

Reg. Gen. Mich. T. 1833.

mentioned, in the presence of this deponent; And this deponent further saith, That the said was, at the time of making such acknowledgment, of full age and competent understanding."

(B.)

"Form of affidavit, *verifying the Certificate, where the Acknowledgment is taken by any of the Commissioners appointed in pursuance of the Act of Parliament.*

B. , of , one of the attornies of his Majesty's Court of , at Westminster, and one of the commissioners named in the certificate hereunto annexed, maketh oath and saith, that he knows , the wife of , in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said , and the certificate signed by the commissioners in the said certificate mentioned, on the day and year therein mentioned, at , in the county of , in the presence of this deponent; and that at the time of making such acknowledgment, the said was of full age and competent understanding; And that the said knew the same acknowledgment was intended for the passing her estate and estates in the premises respecting which such acknowledgment was made; And this deponent further saith, that he, this deponent, [*or* the said *I. K., as the case may be, adding, if not the commissioner making the affidavit*, whose place of residence is at , in the said county], is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent, of any or either of the parties to the transaction giving occasion to the taking such acknowledgment; And this deponent further saith, that in pursuance of the order made by the Court of Common Pleas, in Michaelmas Term, 1833, the said commissioner did inquire of the said , [*or if more than one*, of each of them the said], whether she intended to give up her interest in the estates, in respect of which such acknowledgment was taken, without having any provision made for her in return for or in consequence of her so giving up her interest in such estates; and that in answer to such inquiry, the said declared that she did intend to give up her interest in the said estates, without having any provision made for her in return for or in consequence of her so giving up her interest; which declaration of the said this deponent has no reason to doubt the truth of, and verily believes the same to be true, [*or* declared that a provision was to be made for her in consequence of her giving up her interest in the said estates]; And this deponent, before her acknowledgment was so taken, was satisfied, and does now verily believe, that such provision has been made."

"N. B. When the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it."]

[These affidavits require to be stamped, as they are not made in any suit, See *Re Branson*, 4 Scott, 539.]

ACKNOWLEDGMENT BY MARRIED WOMEN.

made by the Court under the said act should be contained in the same rule:—

Rules of Mich. T. 1833, revoked.

1. "NOW IT IS HEREBY ORDERED, that the said general rules be, and the same are hereby revoked: Provided that this present rule shall not be construed in any respect to invalidate any proceedings which before the first day of March next ensuing shall have been taken pursuant to the direction of the said rules of Michaelmas Term last.

Interest of commissioner.

2. "AND IT IS HEREBY FURTHER ORDERED, that where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned (*a*).

Commissioners to inquire respecting provision for married women.

3. "AND IT IS FURTHER ORDERED, that, before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest; and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but if it shall appear to them or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof.

Affidavit.

4. "AND IT IS HEREBY FURTHER ORDERED, that the affidavit

(*a*) [Charges for proceedings under the statute do not constitute taxable items within the stat. 2 Geo. 2, c. 23, s. 23. *Ex parte Branson*, 4 Scott, 539.]

verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall (except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed,) be made by some practising attorney or solicitor of one of the Courts at Westminster, or one of the Counties Palatine of Lancaster or Durham, and that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent, (or if more than one person join in the affidavit), that one or more of the deponents knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his deponent's knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit; And that previously to such acknowledgment being taken, the deponent had inquired of such married woman (or, if more than one, of each of such married women) whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (Judge, Master or) commissioners.

ACKNOWLEDGMENT BY MARRIED WOMEN.

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5. "AND IT IS HEREBY FURTHER ORDERED, that the *affidavit* shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested, shall by deed be described to be situate (*a*).

Localities to be stated in affidavit.

(*a*) [The Court of Common Pleas has no authority by the act to make any regulations affecting the deeds to be executed by married women; therefore it seems that, notwithstanding this clause, the parcels may be described in

ACKNOWLEDGMENT BY MARRIED WOMEN.

Form of affidavit.

6. "AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary; or such affidavit may be made, where it is found convenient, by one of the said commissioners, with such variation in the form thereof as shall be necessary in that behalf (*a*).

Deliveries of certificates and affidavits.

7. "AND IT IS HEREBY FURTHER ORDERED, that the certificates and affidavits verifying the same shall within one month (*b*) from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the court or a judge.

Fees.

8. "AND IT IS HEREBY FURTHER ORDERED, that the fees or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies, or by the officer of the said court, and for taking acknowledgments of deeds, and for examining married women (*c*), and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows:—

	£	s.	d.
To a Judge or Master for taking the acknowledgment of every married woman, of which 7*s.* 6*d.* will be paid, in the case of a Judge, to his clerk, and the residue thereof will be paid over to the treasury: and in the case of a Master, the whole will be paid over to the treasury, or the Fee Fund Account of the Court of Chancery - - - - - - - - -	1	6	8
To the two perpetual commissioners for taking the acknowledgment of every married woman, when not			

the deed without stating the parish, &c., and of course it will not then be necessary to state any localities in the certificate. It is frequently impossible to do so with accuracy.]

(*a*) [The commissioner may make the affidavit notwithstanding he is the attorney concerned in the transaction. *Re Scholefield*, 3 Scott, 657. As such attorney he cannot, by the third rule, be present at the examination by the other commissioners, and there must therefore be a distinct examination before the deposing commissioner, to enable him to make the affidavit.]

(*b*) [A lunar month. This rule does not seem to apply to a special commissioner under the 3 & 4 Will. 4, c. 74, s. 83. See *Anon.*, 1 Scott, 52.]

(*c*) [The commissioners have a lien upon all deeds in their joint possession, for the fees due to them for taking an acknowledgment; and where they are in the hands of one of the commissioners, and he is duly authorised by the other to detain them as a lien for his fees, he has a right to do so. *Ex parte Grove*, 3 Scott, 671.]

	£	s.	d.
required to go further than a mile from their residence, being 13*s.* 4*d.* for each commissioner - -	1	6	8
To each commissioner, when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expenses - - - - -	1	1	0
To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expenses - - - - - - - - -	2	2	0
To the clerk of the peace, or his deputy, for every search	0	1	0
To the same, for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names - - - - - - - - -	0	5	0
To the same, for every further complete number of 50 names an additional - - - - - -	0	2	6
To the officer for every search - - - - -	0	1	0
To the same, for every official copy of the certificate -	0	2	6
To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names - - - - - -	0	5	0
To the same, for every further complete number of 50 names additional - - - - - - -	0	2	6
To the same, for preparing every special commission, including a fee of 5*s.* to the clerk of the Chief Justice or any other Judge for the fiat - - - - -	0	15	0
To the same, for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of the 3rd and 4th Will. 4, c. 74 - -	0	5	0

"And it is hereby further ordered, that the fees and charges to be paid for the entries of deeds, required by the said act to be entered on the Court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of land held by copy of Court roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act by tenants in tail of lands held by copy of Court roll, and for entries of such surrenders, or the memorandums thereof, on the Court rolls shall be as follows:—

	£	s.	d.
For the indorsements on the deed of the memorandum of production and memorandum of entry on Court rolls, to be signed by the lord steward or deputy			

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	£	s.	d.
steward, each indorsement of memorandum 5*s.*, together	0	10	0
For the entries on the Court roll of deeds, and the indorsements thereon, at per folio of 72 words	0	0	6
For taking the consent of each protector of settlement of lands	0	13	4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders, or the memorandums thereof, on the Court rolls, at per folio of 72 words	0	0	6

N. C. TINDAL.
J. A. PARK.
J. B. BOSANQUET.
E. H. ALDERSON."

"FORM OF AFFIDAVIT *verifying the Certificate of Acknowledgment taken in pursuance of the Act of Parliament, to be made by some practising Attorney or Solicitor, and to be sworn before a Judge of the Court of Common Pleas, or a Commissioner appointed for taking Affidavits in the said Court.*

IN THE COMMON PLEAS.

A. B., of , in the of , gentleman, one of the attornies [*or* solicitors] of the Court of , maketh oath and saith, that he knows the wife of , in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said , and the certificate signed by the Judge or Master, or by *A. B.*, of &c., and *C. D.*, of &c., the commissioners in the said certificate mentioned, on the day and year therein mentioned, at , in the of , in the presence of this deponent, and that at the time of making such acknowledgment the said was of full age and competent understanding, and that the said knew the said acknowledgment was intended to pass her estate in the premises, respecting which such acknowledgment was made; [And this deponent further saith, that to the best of this deponent's knowledge and belief, neither of the said commissioners is [*or* the said *A. B.*, *or* the said *C. D.*, one of the said commissioners is not] in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned;] And this deponent further saith, that previous to the

This is to be omitted when acknowledgment taken by a Judge or Master.

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said (*the married woman*) making the said acknowledgment, he this deponent inquired of the said (*the married woman*) [*or if more than one*, of each of them the said and (*the married women*)] whether she intended to give up her interest in the estates in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for, or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said (*the married woman*) declared that she did intend to give up her interest in the said estates without having any provision made for her in lieu of or in return for, or in consequence of her so giving up such her interest; of which declaration of the said (*the married woman*) this deponent has no reason to doubt the truth, and verily believes the same to be true; [*or* declared that a provision was to be made for her in consequence of her giving up such her interest in the said estates; And this deponent lastly saith, that before her acknowledgment was so taken, he was satisfied, and does now verily believe that such provision has been made by deed or writing, or that the terms thereof have been reduced into writing, and that such deed or writing has been produced to the said Judge, Master, or commissioners;] And, lastly, this deponent saith, that it appears by the deed acknowledged by the said (*the married woman*) that the premises wherein she is stated to be interested are described to be in the parish or place of , (*or* parishes or places of and), in the county of (*or* counties of) (*as the case may be*).

Sworn, &c."

"N.B.—When the whole of the facts cannot be spoken to by one deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit" (*a*).

REG. GEN. TRINITY TERM, 1834.

"IT IS ORDERED, That from and after the last day of this term, where such parts of the affidavit verifying the certificate of acknowledgment taken in pursuance of the late act of Parliament respecting fines and recoveries, as state "the deponent's knowledge of the party making the acknowledgment, and her being of full age," cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person

(*a*) [These affidavits must be stamped, *ante*, p. 251, n.]

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whom the person before whom the affidavit shall be made shall consider competent so to do" (*a*).

"AND IT IS FURTHER ORDERED, That where more than one married woman shall at the same time acknowledge the same deed respecting the same property, the fees directed by the said rules to be taken shall be taken for the first acknowledgment only, and the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees; and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.

"And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in *one certificate* and *affidavit*.

"In every case, the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only."]

[In addition to the forms of the memorandum and certificate of acknowledgment, and the accompanying affidavit, given above, see the forms *infra*, Vol. 5, p. 610.]

(*a*) [See *Re Luke*, 1 Scott, 80, *ante*, p. 246.]

ACKNOWLEDGMENT.

PRECEDENTS.

1. ACKNOWLEDGMENT *by a* MORTGAGEE *to a* MORTGAGOR, *of the Receipt of* TITLE DEEDS.

1. OF RECEIPT OF TITLE DEEDS BY MORTGAGEE.

A SCHEDULE (*a*) of the several deeds and writings this day delivered by [*mortgagor*] of &c., to [*mortgagee*] of &c., upon the execution of a mortgage of certain lands and hereditaments, situate at——-, in the county of——, for securing the payment by the said [*mortgagor*], his heirs, executors, and administrators, of the sum of £——, and interest at £5 *per centum per annum*, unto the said [*mortgagee*], his executors, administrators, and assigns.

Schedule.

10*th* & 11*th Feb.* 1762—Indentures of lease and release, made respectively between A. B. of &c., of the one part; and C. D., of &c,, of the other part.

11*th Feb.* 1762.—Indenture made between G. H., of &c., of the first part; the said A. B., of the second part; the said

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(*a*) When the mortgagor retains a copy of the abstract of title, including an abstract of the mortgage deed, the acknowledgment should be written at the bottom of it.

On copy of the abstract.

When the mortgagee executes a counterpart of the mortgage deed, to be left with the mortgagor, the schedule of deeds and writings and the acknowledgment should be indorsed on the counterpart, and signed by the mortgagee; in which case the title of the schedule may be—

On counterpart of mortgage deed.

"A SCHEDULE of the several deeds and writings, delivered to the within-named [*mortgagee*], at the execution of the within-written indenture."

1. OF RECEIPT OF TITLE DEEDS BY MORTGAGEE.

C. D., of the third part; and J. K., of &c., of the fourth part, being an assignment of a term of five hundred years *in trust* to attend the inheritance, &c. &c.

22*nd March*, 1822.—Indenture made between the said [*mortgagor*], of the one part; and the said [*mortgagee*], of the other part; being a demise for one thousand years by way of mortgage for securing the payment of the sum of £——, and interest at £5 *per cent. per annum.*

23*rd March*, 1822.—Indenture made between the said [*mortgagor*], of the first part; [*trustee of term*], of &c., of the second part; the said [*mortgagee*], of the third part; and [*new trustee of term*], of &c., of the fourth part; being an assignment of the said term of five hundred years *in trust* for better securing the payment of the said mortgage money and interest.

Acknowledgment.

I HEREBY ACKNOWLEDGE that the several deeds and writings, above mentioned, were this day received by me; and I hereby undertake to keep them with the same degree of care with which I keep my own deeds and writings, papers, or other valuable effects (*a*); and upon payment of

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Bailment.

(*a*) It is now understood, that acceptance of goods to be kept *generally*, is merely an undertaking to keep them as the party receiving keeps his own. Hargr. Co. Litt. 89 a, (9). And the notion of Lord Coke, "that *to keep* and *to keep safely*, are one and the same thing," (Co. Litt, 89 a): [*Southcote's case*, 4 Rep. 83 b], was denied to be law by the whole Court, in the time of Chief Justice *Holt*. *Coggs* v. *Bernard*, 2 Ld. Raym. 911, 912. A depositary is responsible only for *gross* neglect; or, in other words, for a *violation of good faith:* and a depositary, whose character is known to his depositor, shall not answer for *mere neglect*, if he take *no better care of his own goods*, and *they also* be spoiled or destroyed. If such a deposit of title deeds as the above, without any express stipulation as to the degree of care, be looked upon as a pawn or pledge, a *pawnee* is answerable only for *ordinary* neglect. [*Coggs* v. *Bernard: Vere* v. *Smith*, 1 Vent. 121; and if the pawnee, notwithstanding ordinary care, loses any of several articles pledged, he has a right to retain the residue for the *whole* of his debt. *Ratcliffe* v. *Davies*, Yelv. 178.] But all bailees become responsible for losses by *casualty* or *violence*, *after* their *refusal* to return the things bailed, on a *lawful demand*. Jones on Bailments, 42, 120, 121; Noy's Maxims, 215, 216, 9th ed. [The degree of care with which the bailee keeps his own goods is immaterial, except as an aid towards judging whether he has been guilty of gross neglect in respect of the goods deposited; the rule being

the mortgage money with interest, according to the purport, true intent, and meaning of the above mentioned indenture of mortgage, I promise and agree to restore and deliver the same deeds and writings unto the said [*mortgagor*], his heirs or assigns, undefaced or injured, (loss or damage by fire or other inevitable accidents only excepted). WITNESS my hand, the——day of——, 18—.

1. OF RECEIPT OF TITLE DEEDS BY MORTGAGEE.

(*Signed*) [*Mortgagee*].

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that an ordinary unpaid bailee is, in the absence of any stipulation to the contrary, liable for gross negligence, and for gross negligence only. *Doorman* v. *Jenkins*, 4 Nev. & M. 170: *Beauchamp* v. *Powley*, 1 M. & Rob. 38. If the situation or profession of a party who gratuitously undertakes to do an act is such as to imply that he has skill in respect of that act, his omission to exercise that skill is in him *gross negligence*, although it would not be so in an ordinary person. Per Lord *Loughborough*, *Shields* v. *Blackburne*, 1 H. Bl. 158. When the bailment is for the benefit of the *bailee* exclusively, he is bound to take the utmost care of the property. Where it is for the benefit of both parties, as in the case of a hiring, depositing with an artisan, &c., he must use *ordinary* care. *Dean* v. *Keate*, 3 Camp. 4: *Bringloe* v. *Morrice*, 3 Salk. 271: *Vere* v. *Smith*, 1 Vent. 121: *Clarke* v. *Earnshaw*, 1 Gow, 30: *Leck* v. *Maestaer*, 1 Camp. 138.]

Liability of bailee for loss.

[The liability of a carrier, it may be here observed, is twofold:—he is liable as an ordinary bailee for negligence, and he is also liable as *insurer*, for loss by any means, except the act of God or of the King's enemies. *Forward* v. *Pittard*, 1 T. R. 27: *Macklin* v. *Waterhouse*, 2 Moo. & P. 319. See *Birkett* v. *Willan*, 2 B. & Al. 356. The stat. 11 Geo. 4 & 1 Will. 4, c. 68, takes away the responsibility of land carriers as insurers, in respect of parcels containing great value in small compass, left without notice of such value or payment of insurance, but seems to leave them still liable for the loss of such parcels by gross negligence, although no notice of their value has been left.]

Liability of carrier.

Stat. 11 Geo. 4 & 1 Will. 4.

[Where the chattel is lost out of the possession of a simple bailee without reward, it may be recovered in trover by either the owner or the bailee. *Nicholls* v. *Bastard*, 2 Cr., M. & R. 659.]

Rights of owner and bailee after loss.

[As to the loss of mortgage or title deeds by a mortgagee, *vide post*, Vol. 4, p. 217; Vol. 5, p. 388.]

2. OF BARGAIN AND SALE IN LONDON TO BAR DOWER.

2. ACKNOWLEDGMENT *by* TWO VENDORS *and the* WIFE *of one of them, of a Deed, before the* LORD MAYOR *of* LONDON, *indorsed thereon previously to enrolment in the Lord Mayor's Court, in order to* BAR *the* WIFE *of* DOWER (*a*).

BE IT REMEMBERED, that on the —— day of ——, 18—, personally came before me [——], Lord Mayor of the city of London, the within-named [*vendor*] and [*wife*] his wife, and [*the other vendor*], and did then and there severally own and acknowledge the within-written indenture to be their free and voluntary act and deed: AND the said [*wife*] being by me the said Lord Mayor privately examined apart from her said husband, did declare her free and voluntary consent to the said deed, and that she had executed the same without being induced thereto by fear or force of her said husband or any other person; and that at the time of the execution thereof, she knew the same to be an absolute

Acknowledgment.

Separate examination of wife.

Bargain and sale of lands in London to bar dower under the custom.

(*a*) A bargain and sale of lands or tenements in London, executed by husband and wife, and *acknowledged* by them before the *Lord Mayor*, or the *Recorder* and *one Alderman*, the wife being examined separately and apart from her husband, and proclaimed and enrolled in the *Hustings of Pleas of Land or Common Pleas* of the *City*, is as effectual for barring a wife of dower as a fine in the Court of Common Pleas at Westminster formerly was, and answers every other purpose of a fine at common law, and consequently is a proper mode of conveying the estate of a married woman. Cru. Dig. 206, 2d ed. Com. Dig. *London*, (N. 3). Bohun's *Privilegia Londini*, 241, 3rd ed. There is not any necessity for a separate bargain and sale, for if the release in fee have the words *bargain and sell*, which is generally the case, it may be used by the parties as a bargain and sale. See Wms. n., 2 Saund. 97 b, (2).

The custom extends to other places.

This custom is not peculiar to London, for by the custom in many other cities and boroughs, a bargain and sale by the husband and wife, where the wife is examined by the mayor or other officer, binds the wife, and those claiming under her, and is equivalent to a fine, 2 Inst. 673. And by the stat. 34 Hen. 8, c. 22, all such customary conveyances shall be of force, notwithstanding the stat. 32 Hen. 8, c. 28. Com. Dig. *Baron and Feme* (G. 4); 1 Rop. Husb. and Wife, 139; Hughes on Writs, 119. [See stat. 3 & 4 Will. 4, c. 75, s. 78. As to the effect of the acknowledgment and register of deeds relating to lands in *Antigua*, &c., *vide post*, Vol. 2, p. 218, 2d ed.]

conveyance of the estate within mentioned to the within-named [*purchaser*]: And the said [*other vendor*] did also acknowledge the name [*his own name*] subscribed to the receipt indorsed upon the said indenture, to be his name and handwriting, and that he had received the consideration money therein mentioned. In testimony whereof, I, the said Lord Mayor, have hereunto subscribed my name the day and year above written.

2. of bargain and sale in London to bar dower.

Acknowledgment of receipt of consideration money.

Deeds *conveying* or *affecting* lands or tenements in London, or any interest therein, may be enrolled either in the *Hustings of Pleas of Land*, or *Common Pleas;* the execution thereof being first *acknowledged* before the Mayor, or the Recorder and one Alderman, and proclamation thereof made at one of these courts. Bohun, 241.

Enrolment of deeds affecting lands in London.

Wills *devising* lands or tenements in the city and liberties of London, duly executed and attested, may be enrolled either in the *Hustings of Pleas of Land*, or *Common Pleas*, the same being first *proved* in open court on the oaths of two of the subscribing witnesses thereto, and proclaimed at one of these Courts; Bohun, 211; and which, according to Perkins, bind all manner of persons as strongly as a fine with proclamations if they do not make their claim unto the same lands or tenements within one year after the proclamations made. Perk. s. 577. *Sed quære; et vide* 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16; 4 Bac. Abr. 462, Gwill. ed., *Limitation of Actions* (B).

Enrolment of wills affecting lands in London.

It is observable that such enrolments may in many cases be attended with the most beneficial effects, as the ill consequences attending accidents, which may befal deeds or wills, or the death of the witnesses thereto, are thereby guarded against. Emerson on the Courts of Law of the City of London, 25. The fees for enrolling a deed, according to Bohun, 241, are 16*s.* 8*d.*

[For a form of a memorandum of acknowledgment of a colonial deed before the Lord Mayor, *vide infra*, Vol. 6, p. 152.]

Acknowledgment of colonial deed.

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3. ACKNOWLEDGMENT *and Approbation of a* Purchase, *by a* Judgment Creditor, *and Declaration that Purchaser shall enjoy, freed from that Incumbrance.*

3. and approbation of a purchase by a judgment creditor.

WHEREAS [*vendor*], of &c., being seised in fee of a messuage and hereditaments in ——, in the county of ——, did, by indentures of lease and release, bearing date on or about the —— day of ——, 18—, convey the same with the appurtenances unto and to the use of [*mortgagee*], of &c.,

Recital of mortgage in fee:

3. AND APPROBATION OF A PURCHASE BY A JUDGMENT CREDITOR.

of having contracted to sell mortgaged estates, and that purchase-money was to be paid to mortgagee in part satisfaction of mortgage-money:

of conveyance to purchaser in fee:

of obtaining a judgment against a vendor.

his heirs and assigns, by way of mortgage, for securing £—— and interest: AND WHEREAS, the said [*vendor*] lately agreed with [*purchaser*], of &c., for the sale to him of the said messuage, &c., for the sum of £——, to be paid to the said [*mortgagee*] in part satisfaction of the sum of £——, due to him for principal, interest, and costs upon security of the said premises; and in pursuance of that agreement, and in consideration of the said sum of £——, paid by the said [*purchaser*] to the said [*mortgagee*], the said messuage and hereditaments have by indentures of lease and release, bearing date respectively the —— and —— days of ——, 18—, been conveyed and assured unto and to the use of the said [*purchaser*], his heirs and assigns, for ever: AND WHEREAS I [*plaintiff*], of &c., did obtain a judgment against the said [*vendor*] in her Majesty's Court of Queen's Bench at Westminster, in Hilary term, in the —— year of the reign of her present Majesty VICTORIA, for the sum of £——, besides £—— and ——*s.* for costs; which judgment is an incumbrance upon all the lands and houses which the said [*vendor*], at the time of obtaining the said judgment, was entitled unto; THEREFORE, for the satisfaction of the said [*purchaser*], I the said [*plaintiff*] do hereby declare my approbation of the sale and conveyance to him made as aforesaid; and that I am well satisfied that the sum of £—— by him paid to the said [*mortgagee*] for the purchase thereof, is a full and valuable consideration for the same; and I promise and declare, that I, my executors, administrators, or assigns, will not nor shall commence or prosecute any action, suit, process, or proceeding, in any court of law or equity, whereby the said [*purchaser*], his heirs, executors, administrators, or assigns, or the said messuage and hereditaments, so to him conveyed or assured as aforesaid, by the said indentures of lease and release of the —— and —— days of ——, 18—, shall or may be affected or prejudiced in any respect howsoever, by reason or means of the said judgment. WITNESS my hand, this —— day of ——, 18—.

For the satisfaction of purchaser, the judgment creditor declares his approbation of the sale; and covenants not to commence any action or do any thing to prejudice purchaser or the estate purchased.

ADMINISTRATION, LIMITED LETTERS OF.

PRELIMINARY REMARKS.

LIMITED ADMINISTRATIONS.

[J. WHERE there is no legal personal representative of a deceased trustee of an attendant term, it frequently becomes necessary to obtain a limited administration, *i. e.* an administration constituting a representative *quoad* the term, which the Ecclesiastical Court will grant at the instance of the owner of the inheritance as a matter of course. The circumstances under which such an administration must be applied for are, where the termor is dead intestate, and there has been no general administration granted of his effects; or the person to whom such administration has been granted is dead, testate or intestate; or the executor of the termor is dead, intestate, or without having proved the will[J.]]

The executor of an executor *ad infinitum* represents the first testator.

The interest vested in an executor by the will of the deceased may be continued and kept alive by the wills of the successive executors: so that the executor of A.'s executor, in however remote a series, is, to all intents and purposes, the executor and representative of A. himself, and has the same interest in the goods and chattels of A., as the first and immediate executor. *Hudson* v. *Hudson*, 1 Atk. 461; 2 Bla. Com. 506; Toll. Ex. 243; Noy's Maxims, 103, 5th ed.; 231, 9th ed.; 3 Bac. Abr. 19, *Executors* (B), 2. 1. pl. 2.

But an executor of an executor cannot prove the will of the first testator.

But this is to be understood when the executor proves the will; Palm. 156; Com. Dig. *Administration*, (G); for, if the first or any other executor die after administering, and before probate, his executor cannot prove the will of the testator; because he is not named executor to him in the will; no person being competent to prove a will but he who is named executor in the will: *Wankford* v. *Wankford*, 1 Salk. 309; and administration of the goods of the testator must be granted *cum testamento annexo* to the executor of

Administration with the will annexed.

LIMITED ADMINISTRATIONS.

Devolution of executorship.

the executor, if the residue of the goods of the testator were bequeathed by his will to the executor; or otherwise to the residuary legatee, if any; or to the next of kin of the testator; 1 Roll. Abr. 907, pl. 10: *Isted* v. *Stanley*, Dyer, 372 a, (8); *Day* v. *Chapfield*, 1 Vern. 200; 11 Vin. Abr. 67, pl. 10, 20, 27; Godolphin's Orphan's Legacy, Pt. 2, Ch. 30, p. 230, 4th ed.

[The reason that the second executor represents the original testator is said to be, that the court which grants him probate has jurisdiction over the original will; 7 Sim. 103. But it was held, in *Fowler* v. *Richards*, 5 Russ. 39, that where the original testator's will was proved in a Prerogative Court, and the executor's will in a Diocesan Court, the second executor did represent the first testator. The Vice-Chancellor, however, in *Jernegan* v. *Baxter*, 5 Sim. 568, said, that before he acted on *Fowler* v. *Richards*, he should direct a case for the opinion of a Court of law. And where the original will was proved in India, and the executor's will in England, the second executor was held not to represent the first testator. *Twyford* v. *Traill*, 7 Sim. 92. An executrix *coverte* may make a will, for the purpose of continuing the representation. *Scammell* v. *Wilkinson*, 2 East, 552: *Barr* v. *Carter*, 2 Cox, 429. An executor of an executor may refuse the executorship of the first testator, while he accepts the office immediately conferred on him; but he cannot accept the executorship of the original testator, and decline that of the mesne executor; 3 Bac. Ab. 42. See 5 Russ. 40, n.]

Executrix *coverte*.

Executor of administrator, &c.

But the executor of A.'s administrator, or the administrator of A.'s executor, is not the representative of A.: Bro. Abr. *Administratours, &c.*, pl. 7, page 16 a, ed. 1573 (*a*) : *Tingrey* v. *Brown*, 1 Bos. & P. 310: *Catherwood* v. *Chaband*, 2 Dowl. & R. 271; 1 B. & Cr. 150; because the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; but the administrator of A. is merely the officer or deputy of the ordinary, prescribed to him by act of Parliament, (31 Edw. 3, stat. 1, c. 11), in whom the deceased has reposed no trust at all: and therefore, on the death of that officer or deputy, it results back to the ordinary to appoint another. And, with regard to the administrator of A.'s executor, he has clearly no privity or relation to A.; being only commissioned to administer the effects of the intestate executor, and not of the original testator,

(*a*) This is the best edition of Brooke; and there are not so many abbreviations of the words as in the other editions.

LIMITED ADMINISTRATIONS.

therefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator *de bonis non* is the only legal representative of the deceased in matters of personal property, including chattels real. *Ley* v. *Anderton*, Styl. 225: *Tingrey* v. *Brown*, 1 Bos. & P. 310. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, *viz.* of certain specific effects, such as a term of years, and the like; the rest being committed to others; 1 Roll. Abr. 908, (D) pl. 1: *Fawtry* v. *Fawtry*, 1 Salk. 36, pl. 2; 2 Bla. Com. 506.

Limited administration.

[Where the will of a termor has been proved in an inferior Court in the province in which the land is situated, having no jurisdiction over the land; or in an inferior Court, having jurisdiction over the land, but not over all the other assets; in order to avoid the transmission of the will from the inferior to the Prerogative Court, an administration limited to the term may be taken out in the Prerogative Court, under which the term may be assigned, notwithstanding a previous assignment by the executor, whose title cannot be proved as to the term.]

Cautions to be observed in taking out limited administration.

[J. In obtaining a limited administration, the point principally requiring attention is, to ascertain that it is taken out in the proper Court: if no administration has previously been taken out, and the termor died in the diocese in which the lands are situate, and there is no reason to suspect that he had effects constituting *bona notabilia* in any other diocese, then an original limited administration may be taken out in the Consistory Court of that diocese. So, if a prior administration has been granted by the Consistory Court of the diocese in which the testator died and the lands are situate, a limited administration *de bonis non* may be had in such Court.J.]

Prerogative administration.

[J. But if there has been a prior administration, granted either by another Consistory Court, or by the Prerogative Court, or the termor died or had effects in another diocese or peculiar, a prerogative administration must be obtained, which will be original if there has been no prior administration in that Court, (for the fact of there having been a prior administration in an Episcopal Court will not prevent its being original *here*), or if not, will be *de bonis non*. The advantage of a prerogative administration is, that it is good until actually vacated, and all the mesne acts of the admini-

LIMITED ADMINISTRATIONS.

Court in which administration should be obtained.

stration are valid, though the testator had not *bona notabilia* in two dioceses, so as to found the jurisdiction. *Vide ante*, p. 167.[J.]]

[[J.] In the preceding observations, it has been assumed that the lands of which the deceased termor died possessed, are in the province in which the prior administration has been taken out; but if this be not the case, *i. e.* if the lands be in the province of York and the administration was granted by the Prerogative Court of Canterbury, or, *vice versâ*, a new original administration must be obtained in the other province, either in an Episcopal or Archiepiscopal Court, as the case may be, precisely in the same manner as if no administration at all had been previously taken out.[J.]]

[[J.] It should be observed, that where probate or administration has been granted by an Archdeaconry Court, this does not prevent a limited administration from being obtained in the Episcopal Court; but it has been held, that where the bishop gave his commissary power to prove the wills of all persons deceased within a certain archdeaconry, the commissary was authorised to grant probate of a will of a person dying in that archdeaconry, though he had a term of years in another archdeaconry; though it was contended that the commissary could have had no power to seize a term of years in lands which did not lie in his archdeaconry, and therefore had not the means of enforcing probate; but the Court observed, that the appointment of the bishop, as it regarded the power of the commissary to prove wills, armed him with episcopal authority for that purpose. The grant of the power attracted to it all the means by which the power could be exercised. *Rex* v. *Yonge*, 5 Mau. & Selw. 119.[J.]]

[[J.] The expense of obtaining limited administration may sometimes be saved by inducing the persons entitled to administer, *i. e.* the next of kin of the deceased, to apply for a general administration; and the cost is borne by the person at whose instance it is obtained. In the case of small properties, the expense of a limited administration is heavily felt, especially where the deeds, through which the deduction of title to the term is to be traced, are numerous; for it is the practice of the officers of the Ecclesiastical Court, who prepare these instruments, to state the deeds at great length; but this may be in part prevented, by furnishing them with a short abstract only of each deed, which is quite sufficient, and is all that can reasonably be required.[J.]]

ADMINISTRATION, LIMITED LETTERS OF.

PRECEDENTS.

1. LIMITED LETTERS *of* ADMINISTRATION *with the Will annexed,* de bonis non, *for the purpose of* ASSIGNING A TERM.

1. LIMITED LETTERS OF ADMINISTRATION.

PREROGATIVE.

ON the —— day of ——, in the year of our Lord——, before the Worshipful [*surrogate*], Doctor of Laws, Surrogate, in his chambers, Doctors Commons, London, present the subscribed Notary Public.

A BUSINESS of granting LETTERS OF ADMINISTRATION, with the last Will and Testament annexed, of the goods, chattels, and credits of [*deceased testator*], late of ——, in the county of Oxford, deceased, left unadministered by [*deceased executors*], deceased, whilst living, the executors of the said will, to [*limited administrator*], of Gray's Inn, in the county of Middlesex, gentleman, as a person for that purpose named by and on the part and behalf of [*owner in fee*], gentleman, under the limitations hereinafter mentioned.

Under £100.

[*Proctor.*]

ON which day [*proctor*] for testator extracted a special proxy, under the hand and seal of the said [*owner in fee*], and made himself a party for him, and alleged that in and by a certain indenture of four parts, bearing date the eleventh

1. LIMITED LETTERS OF ADMINISTRATION.

day of August, one thousand seven hundred and forty-nine, and made between —— of ——, in the county of ——, widow and executrix of the will of [*trustee of term*], late of ——, in the said county of ——, gentleman, deceased, of the first part; R. W., of ——, in the said county of ——, gentleman, of the second part; W. B., of ——, in the said county of ——, esquire, of the third part; and the said [*deceased testator*], by his name and description of J. A., of —— aforesaid, yeoman of the fourth part; it is recited, that, by indenture of mortgage, bearing date the ——day of ——, one thousand seven hundred and fourteen, and made or mentioned to be made between [*mortgagor*] of the one part, and [*mortgagee*] of the other part; the said [*mortgagor*), in consideration among other things of the sum of one hundred and fifty pounds to him paid by the said [*mortgagee*], did grant and to farm let unto the said [*mortgagee*], (*set forth parcels as described in deed*); and the reversion and reversions, remainder and remainders, rents, issues, and profits of the said premises, and all his estate and interest therein; To HOLD the same with the appurtenances unto the said [*mortgagee*], his executors, administrators, and assigns, for the term of five hundred years, subject to a proviso to make void the same on payment of the sum of one hundred and fifty-three pounds fifteen shillings, as therein mentioned; And it is further recited, that, by indenture quadrupartite, bearing date the —— day of ——, one thousand seven hundred and twenty-eight, and made or mentioned to be made between the said [*administrator of mortgagee*], administrator with the will annexed of the said [*mortgagee*] deceased, of the first part; [*heir of mortgagor*], eldest son and heir of the said [*mortgagor*], deceased, of the second part; the said [*purchaser*], of the third part; and the said [*trustee to prevent dower*], of the fourth part; after reciting that the said [*purchaser*] had contracted with the said [*heir of mortgagor*], for the absolute purchase of the said premises, it is witnessed, that, in consideration of the sum of one hundred and two pounds ten shillings, to the said [*administrator of mortgagee*] paid by the said [*purchaser*], in full for all principal and interest moneys due upon the last-recited indenture of mortgage, and for other considerations, the said [*administrator*], by the direction of the said [*heir of mortgagor*], did assign and transfer unto the said [*trustee*], at the nomination of

1. LIMITED LETTERS OF ADMINISTRATION.

the said [*purchaser*], All the before-mentioned premises granted to the said [*mortgagee*], deceased, as aforesaid, and all the estate and interest of the said [*administrator*], in the said premises; To HOLD the same with the appurtenances unto the said [*trustee*], his executors, administrators, and assigns, for the residue of the said term of five hundred years, *In trust* for the said [*purchaser*] his heirs, appointees, and assigns, to go along with the freehold and inheritance of the said premises. *And it is* by the said indenture of the eleventh of August, one thousand seven hundred and forty-nine, after further reciting that the said [*second purchaser*] had contracted with the said [*first purchaser*] for the absolute purchase of the said premises with their appurtenances, *Witnessed*, that, for the considerations therein mentioned, the said [*executrix of trustee of term*], at the request and by the direction of the said [*first purchaser*], and on the nomination of the said [*second purchaser*], testified as therein mentioned, did assign and transfer unto the said [*deceased testator*] all the before-mentioned parcels of arable land and meadow ground, and all and singular other the premises which were granted to the said [*mortgagee*] deceased as aforesaid, and all the estate and interest of her the said [*executrix of trustee of term*] therein, *To hold* the same with the appurtenances unto the said [*deceased testator*], his executors, administrators, and assigns, for the residue of the said term of five hundred years; *In trust* for the said [*second purchaser*], his heirs and assigns, to go along with the freehold and inheritance of the said premises (as in and by the said indenture of the eleventh day of August, one thousand seven hundred and forty-seven, produced and shewn to the surrogate, reference being thereto had, will appear); And the said [*proctor*] further alleged, that the said [*deceased testator*] had since departed this life without having made any assignment of the said term of five hundred years, having made and duly executed his last will and testament in writing and thereof appointed [*executors*], executors, who in the month of April, one thousand seven hundred and fifty-six, duly proved the same in the said Prerogative Court of Canterbury, (as by the acts and records of the said Court, reference being thereunto had, will appear), and for some time intermeddled in the goods, chattels, and credits of the said deceased; that the said [*surviving executor*] survived the said [*deceased executor*],

1. LIMITED LETTERS OF ADMINISTRATION.

but is since also deceased, intestate, leaving some part of the said goods, chattels, and credits unadministered and not fully disposed of, and no letters of administration with the said will annexed of the goods of the said [*deceased testator*], deceased, left unadministered as aforesaid, have been granted to any person by the authority of this Court, and there is not now any legal representative of him the said [*deceased testator*], deceased; And further alleged that his party, the said [*owner in fee*], of &c., by divers mesne conveyances, devises, or other good and sufficient assurances in the law, is become entitled to the freehold and inheritance of the said several parcels of arable land and meadow ground and premises with the appurtenances, comprised in the said term of five hundred years, and has also the sole equitable right, title, and interest in and to the remainder of the said term therein granted and assigned as aforesaid, and now to come and unexpired, but cannot make a legal title thereto for want of a representative of him the said [*deceased testator*], deceased, and that the said [*owner in fee*] has in and by the said proxy by him exhibited, authorised and empowered him to pray and procure letters of administration with the said will annexed, of the goods, chattels, and credits of the said [*deceased testator*], deceased, left unadministered as aforesaid, and under the limitations herein after mentioned, to be conveyed and granted to the said [*limited administrator*] as a person for that purpose named by and on his part and behalf; Wherefore he prayed, and the surrogate aforesaid at his petition decreed letters of administration with the said will annexed, of the said goods, chattels, and credits of the said [*deceased testator*], deceased, limited so far as concerns all his estate, right, title, and interest, in and to the said several parcels of arable land and meadow ground, and premises aforesaid, with their appurtenances, comprised in the said term of five hundred years, and the residue of the said term therein granted and assigned as aforesaid, and now to come and unexpired, and all benefit and advantage to be had, received, and taken thereupon, but not further or otherwise, or in any other manner whatsoever, to be conveyed and granted to the said [*limited administrator*] as a person for that purpose named by and on the part and behalf of the said [*owner in fee*]. And the said [*limited administrator*] being present in judgment, and accepting thereof, the sur-

rogate aforesaid administered to him an oath well and faithfully to administer, and that the whole of the goods, chattels, and credits of the said [*deceased testator*], deceased, as limited, do not amount in value to the sum of one hundred pounds. WHICH I ATTEST.[J.]

1. ADMINISTRATION, LIMITED LETTERS OF.

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2. [J. LIMITED ADMINISTRATION *granted by the Prerogative Court of Canterbury of a* TERM *of* YEARS, *a former general Administration* durante minoritate, *having ceased by the Death of the Minor.*

2. ADMINISTRATION, LIMITED LETTERS OF.

PREROGATIVE.

ON, &c. (*ut ante*, p. 269).

A BUSINESS of granting LETTERS OF ADMINISTRATION, of the goods, chattels, and credits of [*deceased*], late of the parish of ——, in the county of Middlesex, deceased, to [*limited administrator*], of ——, aforesaid, gentleman (*a*), as a person for that purpose named by and on the part and behalf of [*owner of the inheritance*], of Newington in the county of Surrey, Esq., under the limitations hereinafter mentioned. The letters of administration granted in the month of November, one thousand eight hundred and ——, to [*former administrator*], the uncle and curator or guardian lawfully assigned to —— a minor, the natural and lawful and only child of the said deceased, during her minority, having ceased and expired by reason of the death of the said minor in her minority.

ON which day [*proctor*] extracted a special proxy under the hand and seal of the said [*owner in fee*], and made himself a party for him, and alleged that in and by a certain in-

(*a*) [J. It saves expense to name, as the limited administrator, some person who can personally attend at the Court to take the oath, which must otherwise be administered by commission.J.]

2. ADMINISTRATION, LIMITED LETTERS OF.

denture of six parts, bearing date the —— day of ——, 1794, and made between W. T., of &c., and —— his wife, of the first part; T.H., of &c., of the second part; R. S., of &c., of the third part; J. B., of &c., of the fourth part; the said [*deceased*], by his name and description of &c., of the fifth part; and J. M., of &c., of the sixth part; after reciting that by indentures of lease and release, bearing date respectively the —— and —— days of May, 1793, the release being of four parts, and made or mentioned to be made between the said W. T., of the first part; T. A., of &c., (assignee of the residue of the term of one thousand years, by the said indenture in recital assigned, In trust for the said W. T., his heirs and assigns, to attend and wait upon the freehold and inheritance of the premises therein and hereinafter mentioned), of the second part; the said T. H., of the third part; and the said R. S., of the fourth part: the said T. A., for the better securing to the said T. H. the payment of the sum of two hundred pounds and interest, and for other the considerations therein mentioned, did, at the request of the said W. T., and at the nomination of the said T. H., bargain and assign unto the said R. S., ALL THAT (*describe parcels*) and all the estate and interest of him the said T. A. therein: *To hold* the same with the appurtenances unto the said R. S., his executors, administrators, and assigns, for the residue of the said term of one thousand years; *In trust* for the said T. H., his heirs and assigns, subject nevertheless to a proviso for redemption, on repayment of the said sum of two hundred pounds and interest, as therein mentioned. It is recited that the said W. T. had contracted with the said J. B. for the absolute sale and assurance to him of the piece of land hereinafter mentioned, (part of the said piece of ground granted and released to the said T. H., his heirs and assigns, in mortgage as aforesaid). And it is further recited, that the said sum of two hundred pounds was then due and owing to the said T. H., all interest thereon having been paid, and that it had been agreed that the same should be paid off and discharged out of the purchase-money. *It is by the said indenture witnessed,* that, in consideration of the said sum of two hundred pounds, to the said T. H. paid by the said J. B. by the direction of the said W. T., and for other the considerations therein mentioned, the said R. S., by the direction as well of the said T. H. as of the said W. T., and at the nomination of the said J. B., testified as therein men-

tioned, did bargain, assign, and set over unto the said [*deceased,*] *All that* (*describe parcels*), and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate and interest of him the said R. S. therein, *To hold* the same with the appurtenances unto the said [*deceased*], his executors, administrators, and assigns, for the residue of the said term of one thousand years, Upon trust, nevertheless, for the said J. B., his heirs and assigns, to go along with the freehold and inheritance of the said premises, and protect the same from all mesne and subsequent assignments, charges, and incumbrances, (as in and by the said indenture of the —— of August, 1794, produced and shewn to the surrogate appeared). And the said [*proctor*] further alleged, that the said [*deceased*] hath since departed this life, without having made any assignment thereof, intestate, and in the month of November, 1825, letters of administration of all and singular the goods, chattels, and credits of the said [*deceased*], where granted by the authority of this Court to [*former administrator*], the uncle and curator, or guardian lawfully assigned to [*minor*], spinster, a minor, the natural and lawful daughter and only child of the said deceased, for her use and benefit, until she should attain the age of twenty-one years; and the said [*minor*] hath since also departed this life, before having attained the said age of twenty-one years, whereby the letters of administration of the goods of the said deceased, granted to the said [*former administrator*], as aforesaid, have ceased and expired, and no other letters of administration of the goods of the said deceased have been granted to any person by the authority of this Court, and there is not now any legal representative of him the said [*deceased*], deceased. And the said [*proctor*] further alleged, that his party, the said [*owner in fee*], of &c., by divers mesne conveyances, devises, or other good and sufficient assurances in the law, is become entitled to the freehold and inheritance of a piece or parcel of ground, situate in the said parish of —— &c. [*describe it*], being part of the said piece of ground, and several messuages or tenements by the firstly recited indenture of the —— of August, 1794, assigned to the said [*deceased*], with their appurtenances, and has also the sole equitable right, title, and interest, in and to the remainder of the said term of one thousand years, therein granted and assigned as aforesaid, and now to come and unexpired, but cannot make a legal

2. ADMINISTRATION, LIMITED LETTERS OF.

title thereto, for want of a representative of him the said [*deceased*], deceased, to convey and assign the remainder of the said term so as aforesaid vested in him; That his said party has, in and by the said proxy by him exhibited, authorised and empowered him to pray and procure letters of administration of the goods, chattels, and credits of the said [*deceased*], deceased, under the limitations hereinafter mentioned, to be committed and granted to the said [*limited administrator*], as a person for that purpose named by and on his part and behalf. WHEREFORE he prayed, and the surrogate aforesaid at his petition decreed, letters of administration of the goods, chattels, and credits of the said [*deceased*], deceased, limited so far as concerns all his estate, right, title, and interest in and to the said piece or parcel of ground and dwelling-house, with the appurtenances, being part and parcel of the said piece or parcel of ground, and several messuages or tenements by the said indenture of the —— of August, 1794, assigned to the said [*deceased*] as aforesaid, comprised in the said term of one thousand years, and the residue of the said term therein granted and assigned as aforesaid, and now to come and unexpired, and all benefit and advantage to be had, received, and taken therefrom, but no further or other, or in any other manner whatsoever, to be committed and granted to the said [*limited administrator*], as a person for that purpose named by and on the part and behalf of the said [*owner in fee*]; and the said [*limited administrator*] being present in judgment and accepting thereof, the surrogate aforesaid administered to him an oath well and faithfully to administer, and that the whole of the goods, chattels, and credits of the said [*deceased*], deceased, as limited, do not amount in value to the sum of one hundred pounds. WHICH I ATTEST.[J.]]

(*Notarial Seal.*)

AFFIDAVIT.

See *ante*, p. 256; *infra*, Vol. 3, tit. DECLARATION, and Vol. 5, p. 612; Vol. 6, p. 153.

AGREEMENTS.

PRELIMINARY DISSERTATION.

I. Of Parol Agreements and the Statute of Frauds.

1. *Enactments of the Statute of Frauds*, 29 *Car.* 2, *c.* 3; 278.—*Bankrupt Act*, 6 *Geo.* 4, *c.* 16, *s.* 131; 280.—*Lord Tenterden's Act*, 9 *Geo.* 4, *c.* 14; 280.—*To what Matters the Statute of Frauds extends*, 282.—*Vacating Effect of the fourth Section*, 283.—*Parol Licenses*, 284, 286.—*Effect of a Parol Contract*, 285.—*Sales of Standing Crops, Fixtures, &c.*, 290.—*Agreements for Leases*, 299.—*Sale of Shares in a Company*, 299.—*Assignment of Vendor's Lien, Mortgage Debt, &c.*, 300.—*Cases not within the Mischief of the Act:—Sales by Auction*, 301.—*Agreement admitted by the Answer*, 302.—*Agreement part performed*, 303.—*Guaranty*, 308.—*Agreement not to be performed within the Year*, 309.—*Contract for the Sale of Goods*, 311.
2. *What Signature sufficient*, 313.—*Signature by one Party only*, 313.—*Signature as Witness*, 318.—*Letters*, 319.—*Signature by Agent*, 321.—*Brokers*, 323.—*Auctioneers*, 324.
3. *Statement of Consideration*, 326.—*Sufficiency of Consideration*, 329.—*Certainty requisite as to the Terms of the Agreement*, 330.
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5. *Parol Evidence to explain or control Written Instruments*, 348.—*Declarations at Auctions*, 349.—*Evidence of Matters not within the Scope of the Instrument*, 350.—*Evidence to shew Consideration*, 351.—*Evidence to vary a Writing as against Third Persons*, 353.—*Part of the Agreement in Writing*, 355.—*Evidence of Fraud or Mistake*, 355.—*Evidence to assist construction*, 368.—*Usage*, 369.—*Extrinsic Circumstances*, 375.—*Latent Ambiguity*, 378.—*Mr. Wigram's Rules*, 404.—*Parol Variation, or Waiver of an existing Contract*, 408.—*Variation of Contract within the Statute*, 409.—*Abandonment of Contract*, 417.

II. Of Illegal Contracts, *see title* Bond.

III. Of Voluntary Contracts, *see title* Settlement.

IV. Of Stamps on Agreements, *see the conclusion of this volume.*

STATUTE OF FRAUDS, TO WHAT IT EXTENDS.

1. PAROL AGREEMENTS AND THE STATUTE OF FRAUDS.

Parol leases and freehold interests shall have the force of estates at will only.

[THE Statute of Frauds, 29 Car. 2, c. 3 (*a*), enacts, sect. 1, "That all leases, estates of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, *or* by parol *and* not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised *by writing*, shall have the force and effect of leases at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol lease or estates, or any former law or use to the contrary notwithstanding." (*b*).

Sects. 2 & 3 relate to parol leases not exceeding three years, and parol surrenders of leases. *Vide infra*, Vol. 4, pp. 309, 485.

No person to be charged by agreement to answer for the debt of another, &c., unless signed by the party to be charged.

Sect. 4 enacts, "That no action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage (*c*); or upon any contract or sale of lands, tenements, or hereditaments, or any in-

(*a*) [This celebrated statute owes its origin to Lord *Nottingham*, and seems in its progress to have received some touches from the hands of Sir *M. Hale* and Sir *Leonine Jenkins*. See *Ash* v. *Abdy*, 3 Swanst. App. 664; and 5 East, 16.]

(*b*) [Where a canal act authorised the owners of land, set out for the canal, to contract for, sell, and convey the land to the company; and that all such contracts, &c., should be valid in law, any law or statute to the contrary notwithstanding, and that all contracts, &c., should enrolled; and by a subsequent section, that, on payment of the sum agreed for or assessed, the lands and the fee-simple and inheritance thereof should be thenceforth vested in the company, it was considered that a conveyance in writing was not dispensed with by the act. *Doe* d. *Robins* v. *Warwick and Birmingham Canal Co.*, 2 Scott, 717: *Earl of Harborough* v. *Shardlow*, 7 M. & W. 87.]

(*c*) [This clause does not apply to mutual promises of marriage. *Cork* v. *Baker*, 1 Str. 34: *Harrison* v. *Cage*, Lord Raym. 386. *King* v. *Gillett*, 7 M. & W. 55.]

terest in or concerning them (*a*) : for upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, *or some other person thereunto by him lawfully authorised.*"

STATUTE OF FRAUDS, TO WHAT IT EXTENDS.

Sects. 5 & 6 relate to the making and revoking of wills.

Sect. 7 enacts, "That all declarations or executions of trusts or confidences of any lands, tenements, or hereditaments, shall be *manifested and proved* by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

All trusts to be created by writing.

Sect. 8 provides, "That whenever any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been had this statute not been made."

Except trusts arising, transferred, or extinguished by implication of law.

Sect. 9 enacts, "That all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

Assignments of trusts shall be in writing.

Sects. 10 and 11 relate to the payment of debts out of trust estates. *Vide infra*, Vol. 5, pp. 28, 43.

Sect. 12 relates to estates *pur autre vie.*

Sects. 13, 14, 15, and 16 relate to judgments, &c., *infra*, Vol. 5, p. 51.

Sect. 17 enacts, "That no contract for the sale of any goods, wares, and merchandizes, for the *price* (*b*) of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest (*c*) to bind the bargain, or in part of payment, or

What contracts for the sale of goods required to be in writing.

(*a*) [This section extends to an assignment as well as to interests created *de novo* out of an estate. *Anon.*, 1 Vent. 361. Where A., having verbally agreed with B. for the purchase of houses, agreed by writing with C. to sell him the benefit of the bargain for £40, and C. obtained a conveyance, it was held that A. could recover the £40; the transfer of the bargain, though it was one that was not enforceable, being a sufficient consideration. *Seaman* v. *Price*, 10 Moore, 34. It might have been otherwise had the agreement between A. and C. been verbal. See *Bartlett* v. *Pickersgill*, 4 East, 577, n.; 1 Cox, 15.]

(*b*) [See stat. 9 Geo. 4, c. 14, s. 7, *infra*, p. 282.]

(*c*) [See *Blenkinsop* v. *Clayton*, 7 Taunt. 597: 1 J. B. Moore, 328.]

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that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, *or their agents thereunto lawfully authorised.*" (See stat. 9 Geo. 4, c. 14, s. 7, *infra*, p. 282).

Sect. 18 relates to recognisances.

Sects. 19, 20, 21, to nuncupative wills.

Sect. 22. Revocation of wills.

Sect. 23. Soldiers' and mariners' wills.

Sect. 24. Jurisdiction of the Ecclesiastical Courts.

Sect. 25. Husbands not to be obliged to distribute the estate of their wives.]

Stat. 6 Geo. 4, c. 16, s. 131. No bankrupt liable to pay debt discharged by certificate, unless promise be in writing.

[The Bankrupt Act (6 Geo. 4, c. 16, s. 131) provides, "That no bankrupt, after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement, made or to be made after the suing out of the commission, unless such promise, &c., be made in writing, signed by the bankrupt, or by some person thereto lawfully authorised *in writing*, by such bankrupt."]

Lord *Tenterden's* Act, 9 Geo. 4, c. 14.

[The important statute 9 Geo. 4, c. 14, (introduced into the House of Lords by Lord *Tenterden*), after reciting the English and Irish statutes of limitations, (21 Jac. 1, c. 16; 10 Car. 1, sess. 2, c. 6); and that various questions had arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments (*a*), enacts, "That in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, *unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby;* and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; *Provided always* (*b*), that nothing herein contained shall alter or

In action of debt, or upon the case no acknowledgment shall be deemed sufficient unless it be in writing.

Proviso as to part payment.

(*a*) [*Vide ante*, pp. 13, n. (*r*), 22, n. (*m*), 24.]

(*b*) [See *Waters* v. *Tomkins*, 2 Cr., M. & R. 723.]

take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever (*a*); *Provided also*, that in actions, to be commenced against two or more of such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed, for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

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Proviso for the case of joint contractors.

Judgment may be recovered against one, in an action against several.

Sect. 2. "That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea; and it shall appear at the trial that the action could not, by reason of the said recited acts or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

Pleas in abatement.

Sect. 3. "That no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

Indorsements of payment.

Sect. 4. "That the said recited acts, and this act, shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise."

Simple contract debts alleged by way of set-off.

Sect. 5. "That no action shall be maintained, whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith."

Confirmation, of promises made by infants.

Sect. 6. "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or pur-

Representation of character, &c.

(*a*) [See *Waugh* v. *Cope*, 6 Mee. & W. 824, and cases there cited.]

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pose that such other person may obtain credit, money, or goods upon (*a*), unless such representation or assurance be made in writing signed by the party to be charged therewith (*b*)."

Clause in Statute of Frauds extended to contracts for goods, although immediate delivery not intended or possible.

Sect. 7 extends the clause in the Statute of Frauds (sect. 17, *sup.* p. 279), and a similar clause in the Irish statute, 7 W. 3, "to all contracts for the sale of goods of the *value* of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Exemption from stamps.

Sect. 8. "That no memorandum or other writing made necessary by this act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps."

Not to extend to Scotland.

Sect. 9. Act not to extend to Scotland.

Commencement of act.

Sect. 10. Act to commence on 1st January, 1829.]

1. To what matters the statute extends.

What matters within the Statute of Frauds.

[The first section of the Statute of Frauds applies to estates and interests in land actually made or created by parol, while the fourth section applies to contracts or sales of lands, or any interest in or concerning them (*c*). Between them, therefore, every agreement for an interest in land, and every interest executory or executed in land, except such as are excepted by the second section, appear to be included. A more limited construction, however, was put upon the first section in the case of *Crosby* v. *Wadsworth*, 6 East, 602, which was an action of trespass; and the question arose upon the effect of a parol agreement for the purchase of a standing crop of

Crosby v. *Wadsworth.*

(*a*) [The act is so printed: the word "credit" should probably be in this place instead of preceding the word "money." See 1 Mee. & W. 123.]

(*b*) [This clause was fully discussed in *Lyde* v. *Barnard*, 1 Mee.& W. 101.]

(*c*) [It has been suggested that the clause should be read "any agreement made upon consideration of marriage, or [*subaud.* 'any agreement made'] upon any contract or sale of lands," &c.; but the words actually used are quite sufficient to express the meaning, which indeed is unequivocally pointed out by the concluding words of the section, "unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c., for these words apply to every part of the clause that precedes them; thus it was held by Lord *Ellenborough*, in *Wain* v. *Warlters*, 5 East, 16, that the word *promise*, which also occurs in this section, does not mean a bare undertaking on one side, but is restrained by the concluding words to an agreement between two parties, supported by a mutual consideration; and this construction, though once doubted, is now fully established. See *Marshall* v. *Lynn*, 6 Mee. & W. 109, and *infra*, p. 326.]

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grass then growing upon a close of the defendant's. The grass was to be mowed and made into hay by the plaintiff, no time being fixed when the mowing was to begin. The plaintiff was afterwards told by the defendant that he should not have the grass, but he entered, and having mowed about half the grass, was forbidden by the defendant from proceeding, and the remainder of the close was mowed and the old crop carried away by another person by the defendant's direction. Lord *Ellenborough*, C. J., said, "Is it a lease, estate, interest of freehold, or term of years, or an uncertain interest, of, in, to, or out of lands, created by parol within the meaning of the first section, so as to be void, as not having been put into writing? I think, collecting the meaning of the first by aid derived from the language and terms of the second section, and the exceptions therein contained, that the leases, &c. meant to be vacated by the first section must be understood as leases of the like kind with those in the second section, but which conveyed a larger interest to the party than for a term of three years, and such also as were made under a rent reserved thereupon; neither of which circumstances are to be found in this agreement for the growing crop. Supposing it, therefore, on this construction of the statute, not vacated as a lease, &c. under the first section, it then comes to be considered under the fourth section of the act, whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them? and if it be so, then whether this action of trespass be 'an action brought to charge the defendant on such contract or sale,' within the meaning of the statute? Upon the first of these questions I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time, and for given purposes, is a contract or sale of an interest in or at least an interest concerning lands. But the statute does not expressly and immediately vacate such contracts, if made by parol (*a*); it only precludes the bringing of actions to enforce them, by charging the contracting party or his representatives on the ground of such contract and of some supposed breach thereof; which description of action does not properly apply to the one now brought, viz. a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by

Vacating effect of the 4th section.

(*a*) [The seventeenth section distinctly avoids the contracts to which it applies. See *Laythoarp* v. *Bryant*, 3 Scott, 256: *Stockdale* v. *Dunlop*, 6 Mee. & W. 224. But see a dictum of Lord *Denman, contra, Stead* v. *Dawber*, 2 Per. & D. 652. The memorandum under the fourth section is not the contract but only the evidence of it, and therefore may be constituted by a letter to a third person. 3 Atk. 503; see *Bateman* v. *Phillips*, 15 East, 272.]

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Crosby v. *Wadsworth.*

contract or otherwise. But although the contract for this interest in or concerning land may not be in itself wholly void under the statute merely on account of its being by parol, so that if the same had been executed the parties could have treated it as a nullity; yet, being executory, and as for the nonperformance of it no action could have been by the provisions of the fourth section maintained, we think it might be discharged before anything was done under it which could amount to a part execution of it, and this discharge, unfortunately for the plaintiff, appears to have been given in the present instance on the 2nd of July by the countermand and refusal of the defendant of that date, before the plaintiff had done any one act towards carrying the agreement into effect. On this latter ground, therefore, viz. that this parol executory contract, supposing it to have been otherwise valid, was completely discharged by parol, we feel obliged to say that the plaintiff is not entitled to recover."]

Observations on *Crosby* v. *Wadsworth.*

[In the above case had no countermand been proved to have been given previously to the plaintiff's entry and his commencing to mow, the Court seems to have been prepared to decide in favour of the plaintiff; thus acting upon the dictum in the early part of the judgment of Lord *Ellenborough*, that such an agreement executed conferred an interest which was not reduced by the first section to an estate at will, and which could not therefore be countermanded. It is clear, however, that this opinion is erroneous, and that the creation of every interest in land not within the second section is governed by the first.]

General scope of the act.

[With reference to the general scope of the act, *Littledale*, J., said in *Smith* v. *Surman*, 9 B. & Cr. 561; 4 Man. & Ry. 455:— "I infer from the preamble that the Legislature intended to embrace within some of its sections the subject-matter of all contracts. The various contracts enumerated in the several sections of the statute seem also to warrant that inference." But after enumerating the provisions of the several sections, he added, "Now, looking at the object of the statute as recited in the preamble, I collect it was the intention of the Legislature to comprehend within the fourth and seventeenth sections the subject-matter of every parol contract, the uncertainty in the terms of which was likely to produce perjury or subornation of perjury. A contract for mere work and labour is not specifically mentioned in those clauses. Such a contract, therefore, may not be within the statute."]

Contract for work and labour.

Effect of agreement as a license.

[Although an agreement within the fourth section cannot be enforced by either party, it is not avoided by the statute, but operates as a license so far as to shelter the grantee from liability as a trespasser

for any acts done under it before it is countermanded. *Carrington* v. *Roots*, 2 Mee. & W. 248. There the contract was the same as in *Crosby* v. *Wadsworth*, and the action was brought against the seller for a trespass in taking away the plaintiff's horse and cart which he had brought to the close for the purpose of carrying away the grass. The plaintiff had not paid down part of the price beforehand according to the terms of the agreement. It was held that the plaintiff could not sustain his action, that being an incidental and collateral mode of enforcing the contract: and *Parke*, B., said, "I think the right interpretation of the fourth section is this, that an agreement which cannot be enforced on either side, is, as a contract, void altogether: no doubt it may have, as an agreement in fact, some operation in communicating a license; and that appears to be the whole effect of the decision in *Crosby* v. *Wadsworth*. Here no doubt the plaintiff might have pleaded a license, but the defendant would have replied that it was countermanded, and the plaintiff could not have succeeded on that issue." See 5 B. & Cr. 232.]

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Carrington v. *Roots*.

[So a parol contract within the fourth section, being binding on the conscience, may be used in equity as a defence. Thus, if a person by parol contracts to sell an estate to A., and then by writing sells the same estate to B., and afterwards in pursuance of the first contract conveys to A., who has notice of the second contract, B. cannot compel A. to convey the estate to him, for the statute only prevents the enforcement of the contract, and not the use of it for defensive purposes, the conscience being equally bound notwithstanding the statute; and A. having thus a prior equity under his parol contract, notice of the subsequent sale to B. was immaterial. See *Dawson* v. *Ellis*, 1 Jac. & W. 524. So it seems that though a parol undertaking by an attorney cannot be enforced by *action*, the statute does not prevent the Court from enforcing it by exercising its summary jurisdiction over the attorney or the officer of the Court. *In re Graves*, cit. *Evans* v. *Duncombe*, 1 Cr. & J. 372. So a contract for a hiring not to be completed within a year, though not enforceable, may be a good hiring for the purpose of conferring a settlement. See 1 B. & Al. 727.]

Effect of parol contract in giving a prior equity.

Enforcement of parol undertaking against attorney.

Settlement by parol hiring.

[This construction of the fourth section was overlooked in the case of *Rose* v. *Cunynghame*, 11 Ves. 550, where it was held that an estate did not pass in equity by the will of a testator who had taken a conveyance subsequently to the making of his will; the only written evidence offered that a contract for the purchase of the estate had been concluded at the date of the will, being a letter which did not contain the terms of the contract. But the letter t-

Effect of a parol contract.

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self shewed that the contract, whatever it was, was concluded; that none of the terms of it remained to be settled; and the parol evidence and subsequent conveyance proved the same thing. Lord *Eldon* relied on the fact that the contract was not enforceable: but the devisee was not seeking to enforce it. The decision seems to be quite inconsistent with *Dawson* v. *Ellis*, and the cases on settlement cited above. The doctrine held in *Walker* v. *Constable*, 1 Bos. & P. 306; (and see *Stansfield* v. *Johnson*, 1 Esp. 101: *Bartlett* v. *Pickersgill*, 4 East, p. 577, n.; 1 Cox, 15); that in an action upon an agreement to pay interest on a deposit, in consideration of the abandonment of a contract for the purchase of land, it was incumbent on the plaintiff to prove a written contract, as the consideration for the agreement to pay interest, seems to be objectionable on the same ground. See *Seaman* v. *Price*, 10 Moore, 34: *Adams* v. *Fairbain*, 2 Star. 277: *Price* v. *Leyburn*, Gow, N. P. C. 100.]

Whether a parol license is within the statute.

Case of *Wood* v. *Lake*.

[A distinction has been taken between an *interest* in or concerning land, and a mere *license*. Thus, in *Wood* v. *Lake*, Say, 3, the defendant had agreed by parol that the plaintiff should have the liberty of stacking coals upon part of a close belonging to the defendant for the term of seven years, and that during that period he should have the *sole* use of that part of the close; and the plaintiff, after three years' enjoyment, being excluded from the close, brought an action upon the case. *Lee*, C. J., and *Denison*, J., said, "In the case of *Webb* v. *Paternoster*, Palm. 71, it is laid down (*a*) that the grant of a license to stack hay upon land does not amount to a lease of the land; and although it be in that case said that such a license, provided the grant be for a time certain, is irrevocable, it by no means follows that an interest in the land does thereby pass. As the agreement in the present case was only for an easement and not for an interest in the land, it did not amount to a lease, and consequently it was, notwithstanding the Statute of Frauds and Perjuries, good for seven years." *Foster*, J., concurred in opinion that the agreement did not amount to a lease, but he thought that the words in the statute, "any uncertain interest in land," did extend to this agreement, and consequently that it was not good for more than three years. *Lee*, C. J., and *Denison*, J., inclined to be of opinion that those words only related to interests which are uncertain *as to the time of duration*. After taking time to consider, it was held that the agreement was good for seven years.]

(*a*) [The case of *Webb* v. *Paternoster* was decided before the passing of the Statute of Frauds. See 4 Mee. & W. 543.]

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Case of *Winter* v. *Brockwell*. License to do an act on the *licensee's* land.

[In the case of *Winter* v. *Brockwell*, 8 East, 308, which was an action for a nuisance by obstruction of light and air, caused by the erection of a skylight *over the defendant's own ground*, it was held a good defence that the plaintiff had given the defendant a parol license to erect the skylight. The Court relied on the above cited case of *Webb* v. *Paternoster*, Palm. 71; Poph. 151; 2 Roll. Rep. 143, 152, where it is laid down that a license executed is not countermandable, but only a license executory. 4 M. & W. 538. An objection that the license was within the Statute of Frauds, as relating to an interest in land, was overruled at the trial. The license here, it will be observed, was to do an act *on the licensee's own land*, so that the case is properly an authority to shew that an easement may be waived by parol.]

Case of *Tayler* v. *Waters*. Admission to a theatre.

[In *Tayler* v. *Waters*, 2 Marsh. 551; 7 Taunt. 384, the lessee of the Opera House having assigned all his interest in the theatre to trustees, but continuing to manage the concern himself, by deed granted six tickets of admission for twenty-one years or seasons, to J. G., his executors, administrators, and assigns. The action was brought by the assignee of one of these tickets against the acting manager for the trustees, for refusing him admission. It was objected that this was an interest in land which could only be granted by deed, and that the grant to J. G. was void as not being founded on an authority under seal from the trustees, but the objection was overruled. *Gibbs*, C. J., cited *Webb* v. *Paternoster*, where Sir *R. Plummer* granted a license to the plaintiff to lay a stack of hay upon his land for a reasonable time for selling it; afterwards Sir *R. P.* leased the land, and the lessee turned in his cattle and eat the hay, for which the action was brought. The Court held that such license was good, and could not be countermanded within a reasonable time, but that, more than a reasonable time for selling the hay, viz. two years having elapsed, therefore the license was at an end. This case was recognised and acted upon by Lord *Ellenborough* and the rest of the Court of King's Bench, in *Winter* v. *Brockwell*, and the two cases shew that a beneficial interest to be exercised upon land may be granted without deed, and cannot be countermanded, at least after it has been acted upon. They would also be sufficient to shew that this is not such an interest in land as by the Statute of Frauds can only pass by writing; but if any doubt remained upon the latter point, it has long ago been expressly decided by the Court of King's Bench, in the case of *Wood* v. *Lake*, Sayer, 3, better reported in a MS. book of Mr. Justice *Burrough*. * * * These cases abundantly prove that a license to enjoy a beneficial privilege in land may be granted without deed, and, not-

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withstanding the Statute of Frauds, without writing. What the plaintiff in the present case claims is a license of this description, and not an interest in land."]

Wood v. *Manley.* License to leave purchased chattels on the land.

[In *Wood* v. *Manley*, 3 Per. & Dav. 5; 11 Ad. & El. 34, the ricks of hay and oats belonging to the plaintiff had been sold by another to the defendant, and one of the conditions of sale (to which it was found that the plaintiff had assented) was, that the purchasers might leave the hay and corn on the premises until Lady-day if they required it, and were to have the use of the plaintiff's barn whenever they pleased to thrash out the corn, and to enter on the premises as often as they thought proper to remove such hay and corn. The action was brought for a trespass by the defendant's entry and removal of the hay after the plaintiff had given him notice not to do so. It was held on the authority of *Tayler* v. *Waters*, that as the inducement held out to buy at the auction was, that the hay should remain on the premises, the license was irrevocable, being executed just as much as in that case. "The other cases upon the subject," added *Patteson*, J., "certainly differ, and I do not go the length of saying that because a party has bought goods on the land of A., he has the right to free entry to take them away, but here the license is part of the very contract." *Coleridge*, J., thought the license irrevocable on the principle that when, in consequence of the permission given by a party, anything is done upon the reliance of its continuance, the license becomes binding on the party granting it. As to this, see also *Mason* v. *Hill*, 2 Nev. & M. 757: *Wallis* v. *Harrison*, 4 Mees. & W. 538: *Cocker* v. *Cowper*, 1 Cr., Mee. & R. 418; *infra*, p. 289.]

License, when revocable.

Remarks on the authorities as to parol license.

[These are the only cases in which parol licenses relating to land have been held not to be within the Statute of Frauds. Vague dicta, indeed, are to be found in two cases of *Rex* v. *The Inhabitants of Standon*, 2 Mau. & S. 467, and *Rex* v. *Inhabitants of Horndon-on-the Hill*, 4 Ib. 565, which seem to attribute some effect to such licenses, but no definite opinion was expressed. The first of the cases stated above, (*Wood* v. *Lake*), was by much the strongest; and it does seem very extraordinary, that the Court should there have considered a grant of an exclusive license to occupy land for seven years, not to be a grant of an interest in land, within the Statute of Frauds. That case appears to be overruled by subsequent decisions, which have settled, that an easement out of land, even for a definite term, cannot be granted without deed. See the cases stated, *infra*, Vol. 4, pp. 105, 140. Thus, it was held, that rent reserved upon a grant of a right of sporting for six months could

Doctrine that an easement cannot be granted without deed.

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not be recovered, where the grant was made by writing not under seal. *Bird* v. *Higginson*, 4 Nev. & M. 505, *infra*, Vol. 4, p. 664. In *Hewlins* v. *Shippam*, 7 Dowl. & R. 783; 5 B. & Cr. 221, a parol agreement was made between A. & B., that A., who had rebuilt an inn, should be at liberty to construct a drain through the adjoining premises of B., in consideration of A.'s agreeing to raise the chimneys, and pave the yard of B.'s premises, which was done, and the drain constructed. On an action for stopping the drain, it was held, that the plaintiff could not recover, the grant not having been made by deed. The Court held, that the grant in question was of a freehold interest, but expressed a decided opinion, that the rule applied equally to an easement for a term of years. *Bayley*, J., distinguished the case of *Winter* v. *Brockwell*, 8 East, 309, observing, "that that was not the case of a grant of an easement to be used on the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. (*a*). *Webb* v. *Paternoster*, *Wood* v. *Lake*, and *Tayler* v. *Waters*, were not cases of freehold interest; *and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed.* These, therefore, cannot be considered as authorities upon the point." The Court having expressed an opinion that a grant of an easement even for a chattel interest could not be made without deed; and that point having been expressly decided in the subsequent case of *Bird* v. *Higginson*, 4 Nev. & M. 505, the dictum in *Webb* v. *Paternoster*, and the decisions in *Wood* v. *Lake*, and *Tayler* v. *Waters*, at least, must be considered to be overruled; and the case of *Wood* v. *Manley*, though it does not go so far as the others, must, it seems, fall with them. See *Bradley* v. *Gill*, 1 Lutw. 70: *Wallis* v. *Harrison*, 4 Mee. & W. 538: *Cocker* v. *Cowper*, 1 Cr., M. & R. 418. In *Cocker* v. *Cowper*, the circumstances were similar to those in *Hewlins* v. *Shippam*, except that upon the construction of the license it would appear to have been made for a term of years. No notice, however, was taken of that distinction, and *Hewlins* v. *Shippam* was held to

(*a*) [This view of the case does not seem to avoid the difficulty, for the doctrine is, that an incorporeal hereditament (which an easement is) cannot be *transferred*, and therefore cannot be released, any more than it can be created by parol. "*Nihil tam conveniens est naturali æquitati quam unumquodque dissolvi eo ligamine quo ligatum est.*" 6 Rep. 43. In the case of *Liggins* v. *Inge*, 5 Moo. & P. 712: 7 Bingh. 682; the circumstances and the decision were the same as in *Winter* v. *Blockwell;* but the judgment of the Court, which was given at considerable length, does not remove the difficulty, being, indeed, founded rather on consideration of convenience than of strict legal principles, by which, it is submitted, a question affecting real property should be determined.]

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apply. See further, as to the nature of the interest conferred by a license, *infra*, Vol. 4, pp. 664, 684.]

Assignment of dower.

[Dower is an estate in land, which arises by act of law, and therefore it seems, that an assignment of dower is not within the statute; for the assignment does not "make or create" the estate. Before the statute, there needed neither livery of seisin nor writing to any assignment of dower, because it is due of common right. Co. Litt. 34. See *Rowe* v. *Power*, 2 N. R. 34.]

Sale of standing crops, fixtures, &c.

[Another question of frequent occurrence, and closely related to that which has just been discussed, is, whether an agreement for the sale of standing crops, fixtures, &c. is to be considered as an agreement respecting an interest in land, within the 4th section, or an agreement for the sale of goods, wares, or merchandize, within the 17th section; and upon this the authorities are not quite accordant.]

[It seems to be the doctrine of the more recent cases, that contracts for the sale of growing crops, of a nature which makes them emblements, and chattels seizable under a *fieri facias*, are not within the fourth section, and therefore are within the 17th; and this whether the crop is ripe at the date of the contract or not, provided it be in existence at the time (*a*), and whether liberty is given to the buyer to come on the land, and gather the crop himself, or not. But this distinction does not appear to have been thought of in the earlier authorities. The cases are as follow:

Anon. 1 Ld. Raym. 182.

[In an *Anonymous case*, 1 Ld. Raym. 182, is was held, at *Nisi Prius*, that a sale of timber growing upon the land might be by parol, because it was but a bare chattel. This case is clearly overruled by the subsequent authorities. See *Teall* v. *Auty*, *infra*, p. 293, *Scorell* v. *Boxall*, *infra*, p. 295.]

Poulter v. *Killingbeck*. Agreement for delivery of crops in lieu of rent.

[In *Poulter* v. *Killingbeck*, 1 Bos. & P. 397, the plaintiff made a verbal agreement to let land to the defendant, who was to cultivate it for two successive crops, and in lieu of rent to allow the plaintiff a moiety of the crops. While the crops of the second year were in the ground, they were valued for both parties, and the action was brought in *indebitatus assumpsit* for a moiety of the value so ascertained. It was held, that the appraisement having been made, the agreement was executed, and the form of the action was right; and *Buller*, J., said, "With respect to the point made at the trial on

(a) [As to this, however, see now stat. 9 Geo. 4, c. 14, s. 7, *ante*, p. 282, and the case of *Hibblewhite* v. *M'Morine*, 5 Mee. & W. 462, in which the doctrine of Lord *Tenterden* (in *Bryan* v. *Lewis*, 1 Ry. & M. 386), that a man cannot contract for the sale of goods which he has not possession of at the time of the bargain, and no reasonable expectation of receiving, was overruled. The principle seems to apply to a sale of goods not in existence.]

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the Statute of Frauds, this agreement does not relate to any interest in the land, which remains altogether unaltered by the arrangement concerning the crops." As the case was decided, however, the point did not arise upon the original agreement, and the dictum of *Buller*, J., seems to be inconsistent with the recent case of *Earl Falmouth* v. *Thomas*, *infra*, p. 296. See, however, the remarks of *Littledale*, J., in *Mayfield* v. *Wadsley*, *infra*, p. 293.]

Waddington v. *Bristow.* Sale of next year's crop of hops to be delivered off the land by the seller.

[In *Waddington* v. *Bristow*, 2 Bos. & P. 452, there was a written contract for the sale of next year's crop of hops on the land, at so much per hundredweight, to be delivered in pockets at W——. No time was named, the custom in such cases being to deliver within a reasonable time after the hops are picked and dried ; and it was held, that the agreement was not for a sale of goods, wares, and merchandize, within the exception in the Stamp Act then in force. All the Judges, except *Chambre*, J., thought it was not such an agreement, because the hops were not goods at the time of the contract; but *Chambre*, J., seemed to consider that the contract conferred an interest in the land, and therefore was not within the exemption, and admitted that a contract for the sale of as many hops as twenty-two acres might produce, to be delivered at a future day, might be within the exception in the Stamp Act. See *Watts* v. *Friend*. 10 B. & Cr. 446 : and see *Cattell* v. *Gamble*, 6 Scott, 733.]

Crosby v. *Wadsworth.* Sale of grass to be cut by the purchaser.

[*Crosby* v. *Wadsworth*, 6 East, 602, has been already stated, with reference to another point, *ante*, p. 282. There, a contract for a crop of grass to be cut by the purchaser, was held to be within the fourth section. Lord *Ellenborough* said, "At the outset I feel myself warranted in laying wholly out of the case the provision contained in the 17th section of this statute, as not applicable to the subject-matter of this agreement, which cannot be considered in any proper sense of the word as a sale of goods, wares, or merchandizes; the crop being at the time of the bargain, (and with reference to which time, I agree with Mr. J. *Heath* in *Waddington* v. *Bristow*, 2 Bos. & P. 452, that the subject-matter must be taken (*a*)), an unsevered portion of the freehold, and not moveable goods, or personal chattels."]

Parker v. *Staniland.* Sale of potatoes to be dug *by the vendor immediately.*

[In *Parker* v. *Staniland*, 11 East, 362, the owner of a close, cropped with potatoes, contracted to sell the potatoes to the defendant at so much per sack, the defendant to dig them immediately. Part were dug accordingly, the remainder were left in the

(*a*) In the more recent cases, the doctrine seems to have been, on the contrary, that the nature of the subject-matter at the time of the performance of the contract must govern the construction of the agreement and determine its effect. See *Smith* v. *Surman*, *infra*, p. 296.]

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Parker v. *Staniland.*

ground, and spoiled by the frost; and for the value of these the action was brought. It was held, that the fourth section did not apply; the Court seeming to rely mainly on the circumstance that the crop was to be taken immediately. Lord *Ellenborough*, C. J., said that here there was no further profit to be made by the land; and *Bailey*, J., observed, that in *Crosby* v. *Wadsworth*, and *Waddington* v. *Bristow*, the contracts were made for the growing crops of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land, while the crops were growing to maturity, before they were gathered; but here the land was considered as a mere warehouse for the potatoes, till the defendant could remove them, which he was to do immediately.]

Emmerson v. *Heelis.* Sale of growing turnips.

[In *Emmerson* v. *Heelis*, 2 Taunt. 38, a crop of growing turnips was sold by auction in lots, and the defendant purchased several lots, no single lot being above the value of £2; but the purchaser was to bring back a load of manure for every four furrows. The purchaser did not sign any agreement, but the auctioneer wrote down his name. No time was mentioned for the removal of the turnips. Lord *Mansfield*, C. J., delivered the opinion of the Court, and said, that this was a sale of an interest in land, not being distinguishable from the case of hops decided in that Court; but that the signature by the auctioneer was as agent for the purchaser, and therefore binding. The observation, that this was an interest in land, therefore, in effect amounted to no more than a dictum.]

Signature by auctioneer as agent for purchaser.

Warwick v. *Bruce.* Sale of potatoes to be dug by the buyer.

[*Warwick* v. *Bruce*, 2 Mau. & S. 205: a parol agreement entered into in October, to sell all the potatoes then growing on certain land to the plaintiff, at so much per acre, to be dug and removed by the plaintiff; no time was mentioned at which the crop was to be dug. It was objected, that this being a contract for the sale of a growing crop, was within the fourth section, but Lord *Ellenborough*, C. J., said, "If this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby* v. *Wadsworth*. But here is a contract for the sale of potatoes, at so much per acre: the potatoes are the subject-matter of sale, and whether, at the time of sale, they were covered with earth in the field or in a box, still it was a sale of a mere chattel. It falls therefore within the case of *Parker* v. *Staniland*." Although the distinction was taken in the argument, that here the crop was *growing* at the date of the agreement, that does not appear to have been the fact, the agreement having been made

in October. The case, therefore, is not distinguishable from *Parker* v. *Staniland*. See 5 B. & Cr. 833.]

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Teall v. *Auty*. A vendor may recover upon a parol contract for the sale of growing timber, executed by delivery.

[In *Teall* v. *Auty*, 4 Moore, 542, the Court expressed an opinion, that a parol contract, for the sale of growing poles, to be marked and felled by the seller, and removed by the buyer, was within the statute; but the poles having been afterwards severed by the seller, and taken away by the buyer, it was held, that the agreement was executed, and the seller could recover either upon a *quantum meruit*, or, if he could prove it, upon an account stated.]

Mayfield v. *Wadsley*. Sale of crops on giving up possession of a farm.

[In *Mayfield* v. *Wadsley*, 3 B. & Cr. 357; 5 Dowl. & Ry. 224, the plaintiff gave up possession of a farm which he occupied to the defendant, and the growing crop of wheat was valued, and the plaintiff asked the defendant if he would take the wheat at £200, telling him that if he did not, he should not have the farm, to which the defendant agreed. The dead stock was also separately valued to the defendant, at 40*l*. 8*s*. 6*d*. The defendant had possession, and about a fortnight before the trial acknowledged that he had paid £75 on account of this money, and said he would pay no more. A verdict was found for the balance of both sums, deducting the £75. A rule *nisi* for entering a nonsuit, on the ground that the agreement was within the 4th section of the Statute of Frauds, and therefore not set up by part performance, was discharged. *Abbott*, C. J., *Bayley*, J., and *Holroyd*, J., were of opinion, that the contract for the sale of the wheat was distinct from that for the occupation of the farm, and not within the 4th section. *Holroyd*, J., said, that the taking of the land might have been by agreement with the lessor, and there was no evidence that the right of the plaintiff did not cease at the moment when he was to give up possession. But *Littledale*, J., collected that the plaintiff had an interest of longer duration, and that part of the contract was for the assignment of such interest, and he doubted whether this was not a contract relating to the sale of an interest in land. If the giving up of the land was any part of the consideration for the defendant's agreeing to take the wheat which was then sown in the land, the wheat must be considered as part of the land itself (*a*). It was true, that in some cases, there might be a contract for the growing crops, independently of the land itself, but when the land was agreed to be sold, and the vendee took from the vendor the growing crops, the latter were considered part of the land. If the plaintiff had been the

(*a*) [As to this, see *Earl of Falmouth* v. *Thomas*, 1 Cr. & Mee. 89, *infra*, p. 296.]

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owner of the land, and this had been a parol letting, then, perhaps, he might have maintained this action. The contract for crops in that case would have been subsidiary to another parol contract, legal and binding, and not within the statute. So, if there had been an underlease; but if there is an assignment it is otherwise, and I rather collect, that in this case it was an assignment.]

Evans v. *Roberts*. Sale of a "cover" of potatoes to be turned up by the seller.

[*Evans* v. *Roberts*, 5 B. & Cr. 829; 8 Dowl. & R. 611. An agreement, on the 25th September, for the purchase of a "cover" of potatoes then in the ground, to be turned up by the seller for £5, was held not within the fourth section. *Bayley*, J., distinguished the case from *Crosby* v. *Wadsworth*, on the ground that there the purchaser was to have possession of the land, and also because the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time, without cultivation, and does not come within the description of goods and chattels, nor can be seized as such under a *fi. fa.*, and goes to the heir, and not to the executor. But growing potatoes are emblements (*a*), and are deemed chattels by reason of their being raised with labour and manurage. They go to the executor, and may be taken under a *fi. fa.* The learned Judge allowed that the cases of *Parker* v. *Staniland*, and *Warwick* v. *Bruce*, were distinguishable, as there the potatoes had ceased to grow; but the observation of Lord *Ellenborough* in the latter case applied to the present. He disagreed with the extra-judicial opinion of *Mansfield*, C. J., in *Emmerson* v. *Heelis*, and thought that case different from *Waddington* v. *Bristow*. "It has been insisted," he added, "that the right to have the potatoes remain in the ground, is an interest in the land; but a party entitled to emblements has the same right, and yet he is not, by virtue of that right, considered to have any interest in the land. For the land goes to the heir, but the emblements to the executor. In Tidd's Practice, 1039, it is laid down, that under a *fi. fa.* the sheriff may sell *fructus industriales*, as corn growing, which goes to the executors; or fixtures which may be removed by the tenant; but not furnaces, or apples upon trees, which belong to the freehold, and go to the heir. *The distinction is between those things which go to the executor, and those which go to the heir.* It appears, therefore, that where it was necessary at

Sale of growing *emblements* not within the fourth section.

Immaterial that the crop is not ripe.

Sale of a crop of apples.

(*a*) [*Emblement* properly means a corn crop, from *Embler* (modern French *Emblaver*), to sow with corn. Emblements can only be had of crops which ordinarily repay the labour bestowed within the year. See *Graves* v. *Weld*, 2 Nev. & M. 725; 5 B. & Ad. 105, and the cases there collected.]

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Sale of Emblements.

common law to distinguish between what was land and what was not, a growing crop, produced by the labour and expense of the occupier of land, was, as the representative of that labour and expense, considered an independent chattel, not going as the land does, but in a different direction." This was the first distinct enunciation of the principle, which appears to have been followed in the subsequent cases. *Holroyd*, J., did not go quite so far; he said, "The vendor clearly had no interest, so as to entitle him to the possession of the land for a period however limited; for he was not to raise the potatoes. Besides, this was not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire, by the contract, an interest in any specific portion of the land (*a*). In this case the potatoes are not to be dug up by the buyer; but even if that had been part of the contract, I think he would not have had an interest in the land, but a mere easement (*b*). In *Emmerson* v. *Heelis*, it did not appear that the subject-matter of the contract was fit to be taken at the time of the contract. The purchaser was not to pay till January, and it may have continued to grow till that period. * * Here, although some advantage might accrue to the vendor by the potatoes remaining in the land, I think that was not an interest in or concerning land, within the meaning of the 4th section." *Littledale*, J., was of opinion that a sale of any growing produce of the earth, (reared by labour and expense) in actual existence at the time of the contract, whether it be in a state of maturity or not, was not to be considered a sale of an interest in or concerning land within the meaning of the 4th section, but a contract for the sale of goods, wares, and merchandise, within the 17th section.]

Any crops that go to the executor may be sold by parol, though unripe.

[*Scorell* v. *Boxall*, 1 You. & J. 396. The plaintiff by parol purchased standing underwood, to be cut by him, and it was held that he could not maintain trespass for cutting and carrying it away. The dictum of *Treby*, C. J. in 1 Ld. Raym. 182, was cited for the plaintiff. *Hullock*, C. B., relied on the distinction between trees which are annexed to the freehold, and go with it, and corn and other articles raised by industry, which are emblements. If the dictum in Lord Raym. were law, the modern cases which have been decided would never have arisen. He had never before heard that dictum cited as an authority, and the only claim it had to that distinction was the allusion to it by Mr. J. *Holroyd*, in *Mayfield* v.

Scorell v. *Boxall.*

Sale of standing underwood is within the fourth section.

(*a*) [This does not seem to make any essential difference. The contract related to a cover of *land*, and "*id certum est quod certum reddi potest.*" See Bacon's Maxims, reg. 23.]

(*b*) [As to this, *vide ante*, *p.* 286.]

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Wadsley. It had been decided in *Teall* v. *Auty*, that the sale of growing poles does confer an interest in land.]

Smith v. *Surman.*

Sale of timber to be cut by the vendor, not within the fourth section.

[*Smith* v. *Surman*, 9 B. & Cr. 561; 4 Man. & Ry. 155. An agreement for the sale of trees then in the course of being felled by the seller, and where two had actually been cut down, at so much per foot, to be removed by the buyer, was held not within the 4th section, but within the 17th, and therefore void, the price being above £10, for want of writing, or part performance. *Bayley*, J., said, that the contract was not for the growing trees, but for the timber, at so much per foot; *i. e.* the produce of the trees, when they should be cut down and severed from the freehold; and in answer to the objection, that it was a mixed contract for goods and chattels, and for work and labour to be performed by the seller for the defendant, observed, that the timber was to be sold when fit for delivery, and the vendor, so long as he was fitting and preparing it for delivery, was doing work for himself, and not for the defendant (*a*). *Littledale*, J., said, that where the contracting parties contemplate a sale of goods, although the subject-matter at the time does not exist in goods, but is to be converted into that state by the seller's bestowing labour on his raw material, that is within the statute. *It is sufficient, if at the completion of the contract, the subject-matter be goods, wares, and merchandize;* and he added, "if, in this case, the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land, within the meaning of the statute (*b*). The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels." The dictum of *Littledale*, J., it will be observed, is directly in opposition to the decision in *Scorell* v. *Boxall*, *ante*, p. 295.]

Whether a mixed contract for the sale of chattels, and for previously doing work and labour in them, is within the 17th section.

Contract for sale of timber to be felled by the vendee.

Earl of Falmouth v. *Thomas.*

Agreement for the purchase of crops incorporated with an agreement for the tenancy of land held within the statute.

[*Earl of Falmouth* v. *Thomas*, 1 Cr. & Mee. 89. A parol agreement, that in consideration that the plaintiff would let a farm to the defendant for fourteen years, the defendant would take the growing crops and pay for them, and for the work, labour, and materials expended by the plaintiff on them, and for making the land ready for tillage, was held an entire contract, and within the 4th section, by reason of the agreement for the tenancy of the land, incorporated in it.]

[In *Hallen* v. *Runder*, 1 Cr., Mee. & R. 266, it was held, that

(*a*) [See *Garbut* v. *Watson*, 5 B. & Al. 613. The question is now settled by the enactment of the 9 Geo. 4, c. 14, s. 7, *ante*, p. 282.]

(*b*) [See, however, a remark of *Bayley*, B., 1 Cr. & Mee. 105.]

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a parol sale to the landlord, of fixtures which were removable by the tenant, was not within the 4th section. The Court observed, that fixtures removable by the tenant might, even while annexed, be treated for some purposes as chattels; for instance, they might be taken under a *fi. fa.*, in like manner as growing crops, and other *fructus industriales*, which go to the executor, and to which they bear a close resemblance. It was said on the authority of *Lee* v. *Risdon* (*a*), that the price of such fixtures could not be recovered as for *goods* sold and delivered, but that it might as for *fixtures* bargained and sold, or sold and delivered. See *Clayton* v. *Burtenshaw*, 7 Dowl. & Ry. 800; 5 B. & Cr. 41: *Wick* v. *Hodgson*, 12 J. B. Moore, 213.]

Sale of tenant's fixtures not within the 4th section.

[In *Carrington* v. *Roots*, 2 Mee. & W. 248, (stated *ante*, p. 285, upon another point), it was contended on the authority of *Crosby* v. *Wadsworth*, that a sale of growing grass, with liberty for the purchaser to go upon the close, and to cut and remove the grass when fit to be taken, was within the 4th section; but as the action was brought by the buyer for a trespass in removing his horse and cart, and the Court was of opinion that it could not be sustained, whether the contract came within the 4th or the 17th section, the point was not decided.]

Carrington v. *Roots.* Sale of growing grass.

[In *Sainsbury* v. *Matthews*, 4 Mee. & W. 343, the sale was of a crop of potatoes in an immature state, to be dug by the purchaser when fully grown, and paid for at 2*s.* per sack; and it was held to be out of the 4th section. *Parke*, B., said—"This contract gives no right to the land: if a tempest had destroyed the crop in the mean time, and there had been none to deliver, the loss would clearly have fallen on the defendant [the seller]. The case is stronger than that of *Evans* v. *Roberts*, because here there is only a stipulation to pay so much per sack for the potatoes when delivered. It is only a contract for goods to be sold and delivered. In that case all the authorities were reviewed, and the result of them clearly laid down."]

Sainsbury v. *Matthews.* Sale of an immature crop to be dug by the buyer, not within the 4th section.

[*Jones* v. *Flint*, 2 Per. & Dav. 594. A verbal contract for the sale to the defendant of growing crops of corn and potatoes, to be reaped and dug by the defendant, and the stubble afterwards, up to the 30th November. The defendant was to have all that was in

Jones v. *Flint.* Contract for agistment.

(*a*) [7 Taunt. 188; 2 Marsh. 495, where the decision of Lord *Ellenborough* in *Nutt* v. *Butler*, 5 Esp. 176, was followed, that an action for goods sold and delivered would not lie for fixtures, on the principle that so long as they remain fixed they form part of the freehold. So in *Salmon* v. *Watson*, 4 J. B. Moore, 73. This doctrine does not seem to be very consistent with the more recent decisions stated in the text, as to the sale of emblements.]

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the fields, including the hay grass, which he might mow if he liked; and the seller was to have the liberty of turning in two cows and a heifer, and to pay the tithe. The contract was made in August, when the crops were nearly ripe. Lord *Denman,* C. J., stated the later authorities, and observed, that the circumstance that the crops had still to derive some nutriment from the ground, did not alter their character as chattels, and that the agreement that the buyer should dig them, was equally immaterial; for, under that, no more than an easement was granted to him. As to the hay grass, if the parties intended a *sale* of the grass, to be mowed and fed by the buyer, it was both on principle and authority within the 4th section; but, from all the circumstances, the plaintiff having to pay the tithe, and reserving a liberty of turning in his own cattle, it was more reasonable to consider the owner as agisting the vendor's cattle, than as having his cattle agisted by him: and on these grounds, without impeaching *Crosby* v. *Wadsworth,* it was held, that the contract was not within the 4th section.]

Contract for agistment.

Result of the cases.

[The discrepancy which the authorities exhibited has rendered necessary the above detail. It is clear, that some of the earlier cases cannot now be followed. Thus, the *Anonymous case* in Lord Raymond, 182, and Lord *Mansfield's* dictum in *Emmerson* v. *Heelis,* have been repeatedly overruled. The modern authorities are, perhaps, sufficiently consistent to authorise the conclusion, that a sale of crops which are emblements, may be made by parol, although the crops are not fit for removal at the time, and notwithstanding liberty is given to the purchaser to enter the land and gather them himself. (*Warwick* v. *Bruce, Evans* v. *Roberts, Sainsbury* v. *Matthews*). A sale of fixtures which are removable by the tenant, may be stated to come within the same rule; (*Hallen* v. *Runder*); but the doctrine is not easily reconcilable with the case of *Lee* v. *Risdon,* (7 Taunt. 188); nor with those cases which have settled that tenants' fixtures are not goods and chattels, within the clause of reputed ownership, in the bankrupt acts. (*Vide infra,* Vol. 5, p. 251; and *Ex parte King, re Walsh,* 1 Mon., D. & De G. 119). The rule that seems to be most consistent with the cases as to crops, is, that no fixtures, which the executor of the freeholder might claim against the heir, are within the 4th section. Sales of growing grass, timber, or underwood, to be cut by the purchaser, have been held to be within the 4th section; (*Crosby* v. *Wadsworth, Carrington* v. *Roots, Teall* v. *Auty, Scorell* v. *Boxall*); and with the exception of the above-mentioned case in Lord Raymond, there is no decision to the contrary. The dictum of *Littledale,* J., that it is

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indifferent whether the buyer has liberty to enter and cut or not, (*ante*, p. 296), stands unsupported. But a contract for the sale of growing timber, at so much per foot, to be cut by the vendor, has been held not within the 4th section. (*Smith* v. *Surman*). In all cases of sales of crops, &c., where the 4th section does not apply, the 17th does; and if the value is £10 or upwards, there must be a writing, or part payment or performance. The dictum of Lord *Ellenborough*, that such contracts are unaffected by the 17th section, must be confined (as it seems from the later cases) to contracts which come within the 4th section.]

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[A contract for the letting of furnished lodgings is, of course, within the 4th section; and it may be here observed generally, that, although a parol lease for a term of not more than three years, *executed by entry*, is good as a lease under the 2nd section; yet, until so executed, it is a mere contract within the 4th section, for the non-performance of which no damages can be recovered. *Inman* v. *Stamp*, 1 Stark. 12: *Edge* v. *Stafford*, 1 Cr. & J. 391.]

Parol contract for lease for not more than three years.

[A contract by a tenant to pay an increased rent during the remainder of his term, in consideration of improvements to be made by the landlord, is not a contract for an interest in or concerning land, either in respect of the rent, for that is not properly rent, not being recoverable by distress, or in respect of the improvements, for the lessee's interest is the same as before; "it is only that there are bricks and other materials removed from the house, and some others substituted in their room." Per *Littledale*, J., *Donellan* v. *Read*, 3 B & Ad. 904. See *Hoby* v. *Roebuck*, 2 Marsh. 433: *Lambert* v. *Norris*, 2 Mee. & W. 333. An agreement for an *abatement* of rent, however, is clearly within the statute. *O'Connor* v. *Spaight*, 1 Sch. & Lef. 305; and see remarks on *Donellan* v. *Read*, *infra*, p. 310. See *Buttemere* v. *Hayes*, 5 Mee. & W. 456.]

Contracts between landlord and tenant.

[Shares in a railway company are not an interest in land within the 4th section, where the act of incorporation declares that they shall be deemed personal estate; nor would they be so, it seems, even in the absence of such a clause. *Bradley* v. *Holdsworth*, 3 Mee. & W. 422: *Hibblewhite* v. *M'Morine*, 6 Mee. & W. 214. But shares in a mining company (which are transferable without the consent of the other partners, 1 Russ. & M. 49) have been held to be within the statute. *Boyce* v. *Green*, Batty, 608. See, however, *Foster* v. *Hale*, 5 Ves. 308, *contra*. The dictum in *Bradley* v. *Holdsworth*, seems to be irreconcilable with the decision in *Boyce* v. *Green*. See *Fereday* v. *Wightwick*, 1 Russ. & M. 49. On the general question of conversion of real estate, used for partnership

Shares in a company possessing land.

Shares in mines.

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purposes, see *Bligh* v. *Brent*, 2 You. & C. 261: *Cookson* v. *Cookson*, 8 Sim. 529: *infra*, Vol. 4, p. 674; and Collyer on Partnership, p. 83, 2nd ed., and the cases there cited.]

[A right to take water from a well is an interest in land. *Tyler* v. *Bennett*, 6 Nev. & M. 826.]

Mixed parol contract, where part only is void under the statute.

[If part of an entire parol contract relates to land, or is otherwise void under the statute, and another part relates to a matter which is not within the statute, the whole fails. *Mechelen* v. *Wallace*, 2 Nev. & P. 224: *Lord Lexington* v. *Clarke*, 2 Vent. 223: *Cooke* v. *Tombs*, 2 Anst. 420: *Chater* v. *Beckett*, 7 T. R. 201: *Thomas* v. *Williams*, 10 B. & Cr. 664: *Earl of Falmouth* v. *Thomas*, 1 Cr., M. & R. 80. See *Corder* v. *Drakeford*, 3 Taunt. 382: *Harvey* v. *Grabham*, 5 Ad. & El. 61. But where the two parts of the contract are not shewn to be dependent on each other, that part which does not come within the statute will of course stand. *Read* v. *Nash*, 1 Wils. 305: *Mayfield* v. *Wadsley*, 5 D. & Ry. 224, (*ante*, p. 293). See *Hoby* v. *Roebuck*, 7 Taunt. 157: *Donellan* v. *Read*, 3 B. & Ad. 899, (*infra*, p. 310, and Vol. 4, p. 310): *Russell* v. *Moseley*, 6 J. B. Moore, 521: *Mavor* v. *Pyne*, 11 Id. 2: *Thomas* v. *Williams*, 5 Man. & Ry. 625: *Watts* v. *Friend*, Id. 439: *Wood* v. *Benson*, 2 Cr. & J. 95, and the observations on the last cited case in *Williams* v. *Burgess*, 2 Per. & D. 422.]

Vendor's lien.

[The innovations upon the statute which Courts of Equity have sanctioned in the instances of a vendor's lien for his purchase-money, and the lien created by a deposit of title deeds, are treated of *infra*, Vol. 5, pp. 14 and 109. It may be here noticed, that the lien of a vendor has been considered to be assignable by parol. *Dryden* v. *Frost*, 3 Myl. & Cr. 673. And upon principle, it should seem that the benefit of any mortgage security upon real estate may be transferred in equity without writing; for the debt, no doubt, may be so transferred, and the mortgage, which is but an accessory to the debt, (*infra*, Vol. 5, p. 498), must follow its principal. See *Richards* v. *Syms*, Barnard, 90: *Martin* v. *Mowlin*, 2 Bur. 979; 1 Bligh, N. S. 541. Thus, it has been decided, that a mortgage of real estate may be the subject of a *donatio mortis causâ*. *Duffield* v. *Hicks*, 1 Bligh, N. S. 497, (overruling *S. C.*, 1 Sim. & St. 239), and though much was said in that case about the delivery of the deeds, there seems to be no objection, on the ground of the Statute of Frauds, to an oral assignment for good consideration, without any transfer of the deeds. In the case of *Benbow* v. *Townsend*, 1 Myl. & K. 506, Sir J. *Leach*, M. R., went farther. There, A. advanced a sum of money upon mortgage of copyholds, and directed the sur-

Assignment of vendor's lien.

Assignment of mortgage.

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render to be made to the use of his brother, B., telling the mortgagor that the principal was to be for the benefit of B., but that he (A.) should receive the interest; and Sir *J. Leach* held, that the principal, being personalty, was not within the 7th section, but belonged to B., by force of A.'s oral declaration. However, as the rule which admits of parol evidence to rebut a resulting trust within the exception of the 8th section, would equally have carried the money to B., what was said by the Master of the Rolls amounts to little more than a dictum,]

Aim of the act to be regarded.

Cases not within the Mischief of the Act.]—["In all the cases on the Statute of Frauds in this Court, the end and purport of making it has been considered, viz. to prevent frauds and perjuries; so that any agreement in which there was no danger of either, the Court has considered as out of the statute: upon which there have been many cases; as in a bill by purchaser of lands against the vendor, to carry into execution the agreement, though not in writing, nor so stated by the bill, the vendor puts in an answer, admitting the agreement as stated in the bill, it takes it entirely out of the mischief; and there being no danger of perjury, the Court would decree it (*a*). Then if the vendor should die, upon a bill of revivor against his heir, I should not doubt to decree it, although I know no case of it—the principle going throughout, and equally binding the representatives."—Per Lord *Hardwicke*, C., *Attorney-Gen.* v. *Day*, 1 Ves. sen. 221. See *Whitbread* v. *Brockhurst*, 1 Br. C. C. 416.

Purchase before the Master.

Thus, the common case of a purchase before the Master is out of the statute: "nor should I doubt," said Lord *Hardwicke* in the above case, "the carrying into execution against the representative, a purchase by a bidder before the Master, without subscribing, after confirmation of the Master's report, that he was the best bidder (*b*); the judgment of the Court taking it out of the statute." See 11 Ves. 472.]

Sales by auction.

[It was at one time thought, that ordinary sales by auction might, by reason of their publicity, be taken out of the statute, at least as

(*a*) [See *Rondeau* v. *Wyatt*, 2 H. Bl. 63, and *infra*, p. 302.]

(*b*) The purchase is not complete before confirmation of the Master's report, and, in the mean time, all losses fall on the vendor; the bidding in the Master's office being not the contract between the Court and the bidder, but only an authority to the Master to tell the Court, that, if the Court approves, it may contract with the bidder on the terms proposed. *Ex parte Minor*, 11 Ves. 559. But the bidder cannot, it seems, retract his bidding before the report is confirmed. *Anson* v. *Towgood* 1 Jac. & W. 637: *Anon.*, 2 Ves. jun. 335.]

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to goods; (*Simon* v. *Metivos* or *Metivier*, 1 W. Bl. 599; 3 Burr. 1921; see *Hinde* v. *Whitehouse*, 7 East, 558); but it has since been decided otherwise, both as to land and goods. *Walker* v. *Constable*, 1 Bos. & P. 306: *Stansfield* v. *Johnson*, 1 Esp. 101: *Buckmaster* v. *Harrop*, 7 Ves. 341; Id. 456: *Blagden* v. *Bradbear*, 12 Ves. 466. See 9 Ves. 249; 13 Ves. 456: *Higginson* v. *Clowes*, 15 Ves. 516: *Kenworthy* v. *Schofield*, 4 Dowl. & Ry. 556; 2 B. & Cr. 945. In most cases the transaction is sustained by the signature of the auctioneer or broker as the agent of the buyer; as to which, *vide infra*, p. 325.]

Sales by auction.

Parol agreement admitted by the answer. Effect of admitting agreement and pleading the statute.

[With respect to Lord *Hardwicke's* doctrine in *Attorney-Gen.* v. *Day*, of enforcing an agreement admitted by the answer, there has been some diversity of opinion; but it is now settled, that, although the defendant admits the agreement by his answer, he shall not be obliged to perform it, if, at the same time, he insists on the statute as a defence. *Eyre* v. *Iveson*, *Stewart* v. *Careless*, cit. 2 Br. C. C., 563, 564: *Rondeau* v. *Wyatt*, 2 H. Bl. 63: *Walters* v. *Morgan*, 2 Cox, 369: *Moore* v. *Edwards*, 4 Ves. 23 : *Cooth* v. *Jackson*, 6 Id. 12: *Row* v. *Teed*, 15 Ves. 375: *Blagden* v. *Bradbear*, 12 Ves. 466. See the older cases, cited 3 Ves. 390, n.; and *Child* v. *Comber*, 3 Swanst. 423, n. And see *Cottington* v. *Fletcher*, 2 Atk. 155, a decision on the *seventh* section, *contra*. But, having once admitted the agreement, and submitted to perform it, he cannot, on the bill being amended, claim the protection of the statute. *Spurrier* v. *Fitzgerald*, 6 Ves. 548. Nor can a plea of the statute be coupled with another defence. *Cooth* v. *Jackson*, 6 Ves. 12. Where the admission is such as the plaintiff may take advantage of, he must take it as stated by the defendant, and cannot vary it, or introduce other terms by parol evidence. *Pym* v. *Blackburn*, 3 Ves. 34; see *Wills* v. *Stradling*, 3 Ves. 378. And if the plaintiff has mistaken the agreement, and the defendant admits a different agreement from that stated in the bill, the plaintiff may amend his bill, and obtain a decree for performance of the agreement admitted by the defendant, 2 Sch. & Lef. 9: *Mortimer* v. *Orchard*, 2 Ves. jun. 243. See *Legal* v. *Miller*, 2 Ves. sen. 299.]

Fraud.

[The statute will not be allowed to be set up in defence of fraud; and if fraud is used to prevent the agreement being put into writing, that will take it out of the statute. See 2 Br. C. C. 565; 2 Ch. Ca. 135: *Oldam* v. *Litchford*, 2 Freem. 284: *Dutton* v. *Poole*, 1 Vent. 318; 1 Dick. 14: *Halfpenny* v. *Mallet*, 2 Vern. 373; Pr. Ch. 404; 1 Eden, 518: *Podmore* v. *Gunning*, 7 Sim. 644. And it

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Part performance.

is considered fraudulent if either party attempt to take advantage of the statute after the agreement has been partly executed (*a*). The act to be considered as part performance must be in its nature almost necessarily done in pursuance of the above contract. *Gunter* v. *Halsey*, Amb. 586; 14 Ves. 387; 19 Ves. 479; 2 Rose, 328; 1 Mer. 7. See 1 Swanst. 181. Therefore such preliminary acts as the delivery of an abstract, giving directions for conveyances, going to take a view or valuation of the estate, &c., being consistent with a mere *treaty*, are not sufficient. *Clerk* v. *Wright*, 1 Atk. 12; *Bawdes* v. *Amhurst*, Pr. Ch. 402: *Whitchurch* v. *Bevis*, 2 Br. C. C. 559: *Redding* v. *Wilkes*, 3 Br. P. C. 400: *Cooke* v. *Tombs*, 2 Anst. 420: *Earl of Glengall* v. *Barnard*, 1 Kee. 769. See *Cooth* v. *Jackson*, 6 Ves. 12, 41: *Child* v. *Comber*, 3 Swanst. 423, n. Where the defendant agreed by parol, that, upon the plaintiff's procuring a release from A. B., he would make an underlease to him, and the plaintiff procured the release, by giving A. B. a free admission to the Pantheon, of the value of £15 per annum, it was held not part performance, but preparatory merely, and not sufficient to exclude the statute; *O'Reilly* v. *Thompson*, 2 Cox, 271; a decision not very consistent with the reasoning upon which the cases on part performance are based. But taking possession with the vendor's consent is a part performance. *Butcher* v. *Stapely*, 1 Vern. 363: *Pyke* v. *Williams*, 2 Id. 455: *Cole* v. *White*, cit. 1 Br. C. C. 409: *Lord Aylesford's case*, 2 Str. 783: *Lockey* v. *Lockey*, Pr. Ch. 519: *Binstead* v. *Colman*, Bunb. 65: *Potter* v. *Potter*, 1 Ves. sen. 437: *Bowers* v. *Cator*, 4 Ves. 91: *Buckmaster* v. *Harrop*, 13 Ves. 456: *Morphett* v. *Jones*, 1 Swanst. 172. See *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123: *Savage* v. *Carrol*, 1 Ball. & B. 551: *Kine* v. *Balfe*, 2 Id. 348: *Mundy* v. *Jolliffe*, 9 Sim. 413. And if the vendor allows the purchaser to make improvements, or expend money upon the property, that makes the case stronger. *Lister* v. *Foxcraft*, Colles, P. C. 108: Gilb. Eq. R. 4, 11; 2 Vern. 456: *Floyd* v. *Buckland*, 2 Free. 268: *Wills* v. *Stradling*, 3 Ves. 378: *Mortimer* v. *Orchard*,

(*a*) [Part performance as to one lot will not affect contracts between the same parties as to other lots sold at the same auction. *Buckmaster* v. *Harrop*, 7 Ves. 340; 13 Id. 456.]

[Fraud being the ground of enforcing an agreement part performed, Lord *Redesdale* was of opinion that the remainderman would not be bound by such an agreement made by tenant for life, in pursuance of a leasing power; for fraud is personal. *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52. But as fraud is the true foundation of the jurisdiction of equity, in enforcing all contracts whatever, the distinction seems to be somewhat fine. If the remainderman has acquiesced in any expenditure by the tenant he is bound of course. *Stiles* v. *Cowper*, 3 Atk. 692.]

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2 Ves. jun. 243: *Gregory* v. *Mighell*, 18 Ves. 328: *Toole* v. *Medlicott*, 1 Ball & B. 401. See *Marshall* v. *Corporation of Queenborough*, 1 Sim. & St. 520: *Wilmot* v. *Corporation of Coventry*, 1 You. & C. 518, (as to contracts not under the seal of a corporation (*a*)) and see *O'Reilly* v. *Thompson*, 2 Cox, 271: *Charlwood* v. *Duke of Bedford*, 1 Atk. 497. But the terms of the agreement must of course be clearly made out; and where there is any discrepancy in the evidence, the Court will not decree performance. *Reynolds* v. *Waring*, Younge, 346. But if the Court can satisfy itself of the facts, a controversy between the parties as to the sums, and a variance in the evidence, will not prevent performance being decreed. Per Lord *Hardwicke*, 1 Ves. sen. 221: *Allan* v. *Bower*, 3 Br. C. C. 149. See 3 Ves. 712: 6 Ves. 470; 1 Sch. & Lef. 40; 1 Swanst. 172: 1 Wils. 100. Where the party is a tenant, who, of course, continues in possession, unless he has notice to quit, the mere fact of his continuance in possession, (which is all that can be admitted, for *quo animo* he continued in possession, is not a subject of admission), would not weigh. 3 Ves. 381: *Savage* v. *Carroll*, 1 Ball & B. 282: 14 Ves. 388: 1 Swanst. 181. But payment of an additional rent, though equivocal, may be evidence of part performance. If it is averred that the defendant accepted the additional rent upon the foot of the agreement, he must say whether it was accepted upon a yearly holding, or any other ground. 3 Ves. 382. In *Fraser* v. *Dawson*, 14 Ves. 385, a tenant under a lease, who was bound to repair, re-built a party-wall, which was ruinous, and insisted on that as part performance of an agreement by the landlord, that, in consideration of his doing so, he should have ten years added to his lease. But it was objected, that he was bound to re-build the wall under the Building Act; and the statute was held to apply. Sir *W. Grant*, M. R.—"It is necessary to shew a part performance; that is, an act unequivocally referring to and resulting from the agreement, and such that the party would suffer an injury amounting to fraud by the refusal to execute that agreement. This is not an unequivocal act; for it would have taken place equally if there had been no agreement. The principle of the cases is, that the act must be of such a nature, that, if stated, it would, of itself, infer the existence of some agreement; and then parol evidence is admitted to shew what the agreement was. But

(*a*) [In these cases a corporation was held bound by contracts not under seal, on the faith of which expenditure had been made. With some trifling exceptions, (but see 6 Ad. & El. 829), a corporation can only be bound at law by its common seal. *Mayor of Ludlow* v. *Charlton*, 6 Mee. & W. 815.]

this act would not infer the existence of any agreement; as it must have been done by the party, either at his own or the landlord's expense. Then, is there such injury as cannot easily be repaired in any other way than by executing the agreement? No—for the money which he has expended he may recover from the landlord, if it was by the landlord that the expense was to be borne. The circumstance that the party may be obliged to resort to an action to get back his money, is no reason for taking the case out of the statute. Lord *Redesdale*, in a case before him, (*Clinan* v. *Cooke*), states his opinion, that payment of money is not a part performance; yet then the act can hardly be said to be equivocal in its nature, as the payment of a price presupposes a sale; but the money may be repaid, and the parties are restored to their former condition." See *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1. This leads us to consider the effect of payment of the whole or part of the purchase-money.]

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[Whether the payment of the whole or a substantial part of the purchase-money is such a part performance of a contract for the sale of lands as will take the case out of the statute, has been the subject of many contradictory decisions and dicta. In *Lacon* v. *Mertins*, 3 Atk. 1; 1 Ves. sen. 312; 1 Dick. 664; and *Maine* v. *Melbourn*, 4 Ves. 720, it was said that a payment of a considerable part of the price would have that effect; and in the last case it was said, that there had been a decision in the time of Lord *Hardwicke* to the same effect. And see a case cited in 2 Freem. 281; *Dickinson* v. *Adams*, cit. 4 Ves. 722. *Alson* v. *Patten*, 1 Vern. 472, where a pair of compasses was given as *earnest*, is clearly wrong, as reported. See 4 Ves. 721. The point arose in *Coles* v. *Trecothick*, 9 Ves. 234; but the Court gave no opinion upon it, deciding the case on other grounds. In *Ex parte Hooper*, 1 Meriv. 9, Lord *Eldon* treated it as unsettled; and see 7 Ves. 345. In Freem. 486, ca. 664 b, it is laid down that payment of a great part of the money would not take the case out of the statute; and in *Leake* v. *Morrice*, where there had been a part payment, no attempt seems to have been made to insist on that circumstance as material. *Seagood* v. *Meale*, Pr. Ch. 560, decided that payment of a small portion of the purchase-money would not do; and it was said generally that the payment of money was only binding in cases of contracts for goods. See 4 Ves. 722. Lord *Alvanley*, in *Forster* v. *Hale*, 3 Ves. 712, disapproved of the decisions as to part performance, and said that there might be a compensation in all cases. In a case before Lord *Cowper* (*Lord Pengall* v. *Ross*, 2 Eq. Ab. 46,

Effect of paying part or all of the purchase-money.

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P art payment.

pl. 12), A. agreed to let lands to B. for twenty-one years, at a rent and £150 fine; B. paid £100 in part to A.'s agent, which A. knew of, and ordered his agent to prepare the lease, but before it was executed repented and refused to grant the lease. Lord Chancellor: "The payment of this £100 is not such a performance of the agreement on one part as to decree an execution on the other, for the Statute of Frauds makes one sort of contracts, viz. personal contracts, good, if any money is paid in earnest. Now that statute says that no agreement concerning lands shall be good except it is reduced into writing; and therefore a parol agreement, as it is in this case, cannot be good within the statute, by giving money in earnest, for there must be something more than a bare payment of money on the one part to induce the Court to decree a performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as when beginning to build, or letting the other into possession, &c. In such case, where the agreement hath proceeded so far on one side, the statute never intended to restrain this Court from decreeing a performance on the other." But he would not put the plaintiff to his action to recover his £100, and decreed it to be refunded. Accordant with this is a decision by Lord *Redesdale*, *Clinan* v. *Cooke*, 1 Sch. & Lef. 22, in which, however, the authorities on the other side do not seem to have been adverted to. "It has always been considered," said his Lordship, "that the payment of money is not to be deemed part performance to take a case out of the statute. *Seagood* v. *Meale*, Pr. Ch. 560, is the leading case on that subject; there a guinea was paid by way of earnest, and it was agreed clearly that it was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both cases as part payment, and no distinction can be drawn. But the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said that in another case, viz. with respect to goods, it shall operate as part performance. And the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred that where the Legislature has said it should bind in the case of goods, &c., and were silent as to the case of lands, they meant that it should not bind in the case of lands. But I take another reason also to prevail on the subject. I take it that nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agree-

Clinan v. *Cooke*.

ment is performed. For instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcroft* v. *Lister*, cit. Pr. Ch. 519. There the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong doer, and to account for the rents and profits ; and why, because he entered in pursuance of an agreement. There, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible ; and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded in permitting part performance of an agreement to be a ground for avoiding the statute ; and I take it that nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance, for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest." See *O'Herlihy* v. *Hedges*, 1 Sch. & Lef. 123, and the remarks of Sir *W. Grant*, *ante*, p. 304.]

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Payment of purchase-money.

[Payment of the auction duty clearly is not part performance. Upon a sale by auction so much is paid to the vendor as part payment, and so much to the Government as tax. If the purchaser refuses to pay the tax, his bidding is void. If he pays it, the only consequence is, his bidding has the same effect as it would have had if no such law had been made, and no other. *Buckmaster* v. *Harrop*, 7 Ves. 340 ; 13 Ves. 456.]

Payment of auction duty.

[In the last-mentioned case the payment had been made by the party against whose personal representatives the agreement was sought to be enforced, a circumstance which was alone sufficient to support the judgment. Sir *W. Grant*, M. R. said, " But suppose the payment of the auction duty could be considered part of the price, I do not see how that could bind the purchaser. In general, the party seeking the performance must shew a performance on his side as a reason for the interference of the Court in his favour ; for the ground upon which the Court acts is fraud in refusing to perform after performance by the other party. Now the purchaser's refusal after payment of his purchase-money would be no fraud upon the seller, but his own loss ; in this case the loss of the personal estate." So, where the plaintiff had executed and registered the conveyance, it was held immaterial ; and though it was true he might have a difficulty in getting back the estate, yet it being his own doing, and

Part performance must be on the side of the *plaintiff*.

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with a design to fasten the estate on the defendant, he must thank himself for it. *Hawkins* v. *Holmes*, 1 P. Wms. 770.]

Parol contract respecting land executed at law.

[A parol agreement respecting land being completely executed on both sides in respect of the land, will be taken out of the statute even at law, although not fully performed in other respects. Thus, where a tenant being restrained from assigning without license, verbally agreed with his landlady that if she would accept another tenant in his place, he would pay her £40 out of £100 which he was to receive for the good-will if her consent were obtained; and the new tenant was let into possession, and paid the £100 to his predecessor, being cognizant of the agreement; it was held, that as the agreement was executed, the landlady could recover the £40 as money received to her use. *Griffith* v. *Young*, 12 East, 513.]

What undertakings for third persons are within the 4th section.

Promise to answer for the Debt, &c., of Another]—[The "special promise to answer for the debt, default, or miscarriage of another person," contemplated by the act, is often called a *collateral* promise, (see Bull. N. P. 281), and is distinguished from contracts which constitute a *primary* liability, though for the benefit of another person. Thus, in *Birkmyr* v. *Darnell*, Salt. 27, Lord *Holt* said—"If two come to a shop, and one buys, and the other to gain him credit promises the seller—*If he does not pay you, I will;* this is a collateral undertaking, and void (*a*), without writing, by the Statute of Frauds. But if he says—*Let him have the goods, I will be your paymaster* or *I will see you paid*; this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." See 1 Wms. Saund. 211, n.: *Peckham* v. *Faria*, 3 Doug. 13: *Barber* v. *Fox*, 1 Stark. 270: *Tomlinson* v. *Gell*, 1 Nev. & P. 588: *Goodman* v. *Chase*, 1 B. & Al. 297. The question, to whom was the primary credit given, is for the jury. Bull. N. P. 281: *Darnell* v. *Fleet*, 2 Car. & P. 82. It is immaterial, for this purpose, whether the promise was given before or after the third person obtained the goods on credit. *Matson* v. *Wharam*, 2 T. R. 80: *Jones* v. *Cooper*, Cowp. 227: *Green* v. *Cresswell*, 2 Per. & D. 430. Where A. sold goods to B., and B., not being able to pay for them, transferred them to C. who promised A. that he would pay for them, this was held to be a new sale to C., and not within the clause. *Browning* v. *Stallard*, 5 Taunt. 450. For other instances of promises not within the

(*a*) [That is, not enforceable by action. *Ante*, p. 283.]

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statute, see *Howes* v. *Martin*, 1 Esp. 162 : *Houlditch* v. *Milne*, 3 Id. 86: *Barrell* v. *Trussell*, 4 Taunt. 117 : *Castling* v. *Aubert*, 2 East, 325: *Williams* v. *Leper*, 3 Burr. 1806: *Anstey* v. *Marden*, 2 Smith, 426: 1 N. R. 124: *Goodman* v. *Chase*, 1 B. & Al. 297: *Dixon* v. *Hatfield*, 10 J. B. Moore, 42: *Bampton* v. *Paulin*, 12 Id. 497: *Lacy* v. *M'Neile*, 4 Dowl. & R. 7: *Hodgson* v. *Anderson*, 5 Id. 735: *Adams* v. *Dansey*, 4 Moo. & P. 245: *Bushell* v. *Beavan*, 4 Moo. & Sc. 622: *Andrews* v. *Smith*, 2 Cr., M. & R. 627 : *Simpson* v. *Penton*, 2 Cr. & M. 430 : *Bird* v. *Gammon*, 5 Scott, 213 : see 2 Per. & D. 434. As to the consideration for the promise, *vide infra*, p. 326.]

Collateral contract for indemnity.

[An agreement upon coming into a partnership, to indemnify the outgoing partner from the debts, has been held not to be within the Statute of Frauds ; the transaction is rather a purchase than a guarantee. *Warren* v. *Taylor*, 1 C. P. Coop. 174. See 1 N. R. 124 : *Thomas* v. *Cook*, 2 Man. & R. 414 ; 8 B. & Cr. 728.]

Agreement not to be performed within the year.

Agreement not to be performed within the Year.]—[This clause does not control the other part of the section, so as to give validity to any agreements relating to land, &c. which must be in writing, although they are to be performed within the year. See *Hollis* v. *Edwards*, 1 Vern. 159. It was there said, that the clause did not extend to agreements respecting land at all; but that is not so, *vide ante*, p. 282. An agreement for a hiring for a year, not to commence immediately, is within the 4th section ; *Bracegirdle* v. *Heald*, 1 B. & Al. 722 (where the agreement had not been performed at all and the breach occurred within the year); *Snelling* v. *Lord Huntingfield*, 1 Cr. M. & R. 20. But as to the latter case, where there had been a part performance, see and consider the principle of *Gandell* v. *Pontigny*, 4 Camp. 375 : *Collins* v. *Price*, 2 Moo. & P. 233, and the cases on tenancy under a parol agreement, *infra*, Vol. 4, p. 458.

Uncertainty as to the time within which agreement is to be performed.

Where the agreement is to be performed upon a contingent or future event, and it does not appear upon the face of it that this is to happen after the end of the year, a note in writing is not necessary, although, in fact, the agreement is not performed within the year. But where it appears from the whole tenor of the agreement, that it is to be performed, in whole or in part, after the year, the 4th section applies. In *Peter* v. *Compton*, Skin. 353, the defendant promised for a guinea to give the plaintiff so many at the day of his marriage ; and the agreement was held good without writing, although the marriage did not take place until nine years afterwards. So in *Fenton* v. *Emblers*, 1 W. Bl., 353; 3 Burr. 1278, where the agreement was, that, in consideration that the plaintiff would become the defendant's testator's housekeeper, the testator

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Agreement not to be performed within the year.

would bequeath to her a certain annuity for life, *Denison*, J., said—"The Statute of Frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed. A contingency is not within it, nor any case that depends upon a contingency." See *Wells* v. *Horton*, 12 J. B. Moore, 176. In this particular, the 17th section has received a different construction from the 4th: for it has been held, that an agreement for the sale of goods at a certain rate, the quantity being uncertain at the time, but which eventually proved to be so much as to make the price for the whole amount to more that £10, was within the 17th section. *Watts* v. *Friend*, 10 B. & Cr. 446.]

Boydell v. *Drummond.* Part performance.

[Where the defendant agreed to take the Boydell prints from Shakspeare, upon an understanding that there were to be eighteen numbers at three guineas each, to be published at the rate of one or two numbers in a year; and on the delivery of each number, two guineas were to be paid in advance for the next number; and the defendant paid his two guineas: it was held that the clause in question applied, for the parties could not have contemplated the completion of the contract within the year. "It has been argued," said Lord *Ellenborough*, C. J., "that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is *performed*, which, *ex vi termini*, must mean the *complete* performance or consummation of the work; and that is confirmed by another part of the statute requiring only part performance of an agreement to supersede the necessity of reducing it to writing, which shews that when the legislature used the word *performed*, they meant a complete and not a partial performance." *Boydell* v. *Drummond*, 11 East, 142. See, *Bracegirdle* v. *Heald*, 1 B. & Al. 726: *Buston* v. *Collyer*, 2 C. & P. 607: *Reynolds* v. *Cowper*, 5 Vin. Ab. 524, pl. 47; 1 Bac. Ab. 75.

Donellan v. *Read.*

The late case of *Donellan* v. *Read*, 3 B. & Ad. 899, does not seem to be quite consistent with this doctrine. There the defendant, being tenant for years of a messuage, under a lease, agreed, by parol, with his landlord to pay an increased rent of £5 during the remainder of the term, the landlord laying out £50 in certain improvements; and the landlord having performed his part within the year, it was held not to be a contract for an interest in or concerning land, and that he might sue the tenant for the increased rent. "As to the contract not being to be performed within a year, we think that as the contract was entirely executed *on one side* within a year, and as it was the intention of the parties, founded on a reasonable expectation that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often

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happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that ground, when the buyer had had the full benefit of the goods on his part (*a*). In the case of *Boydell* v. *Drummond*, the contract was not completely executed *on one side;* and the case was such that in the common course of the publication it was not expected that it should be completed in a year." Per *Littledale*, J., Id. p. 906: and see an observation of *Parke*, J., Id. p. 903, citing a dictum of *Abbott*, J. (in 1 B. & Al. 727), in confirmation of the judgment of the Court. The objection to the decision appears to be, that the statute requires performance of the *agreement, i. e.* of what is to be done on *both* sides, (see the cases cited, *infra*, p. 327, as deciding that the *consideration* for a guarantee is part of the agreement), and that performance on one side is not performance of the agreement. See *Griffith* v. *Young*, 12 East, 513, *ante*, p. 308.]

Sale of goods; what cases within the 17th section.

Contract for the sale of goods.]—[It was formerly held, that if the goods did not exist at the time of the contract, in the state in which they were to be delivered, (as where the contract was for the purchase of a carriage to be made, or of oak pins to be cut out of slabs), the case was not within the 17th section. *Towers* v. *Osborne*, Sh. 506: *Clayton* v. *Andrews*, 4 Burr. 2101. "If the thing be capable of delivery at the time, why is it not done? But the same reason does not apply where the goods are not deliverable." Per Lord *Ellenborough*, C. J., *Groves* v. *Buck*, 3 Mau. & S. 178. See, however, *Cooper* v. *Elston*, 7 T. R. 14: *Smith* v. *Surman*, *ante*, p. 296, and *Pinner* v. *Arnold*, 2 Cr. M. & R., 613; (a decision on the Stamp Act, 55 Geo. 3, c. 184); and, as to contracts for the sale of goods existing, but to be delivered at a future time, see *Alexander* v. *Comber*, 1 H. Bl. 20: *Rondeau* v. *Wyatt*, 2 Id. 63; *Garbutt* v. *Watson*, 1 Dowl. & Ry. 219. The 7th section of the stat. 9 Geo. 4, c. 14, (*ante*, p. 281), has set the question at rest, and extends the provisions of the 17th section of the Statute of Frauds to executory contracts of the kind mentioned above. See *Hoadley* v. *Maclaine*, 4 Moo. & Sc. 340. And the agreement is within the clause, although, at the time it is made, it is uncertain whether the goods will be of the value of £10, provided they do in the event prove to be of that value. *Watts* v. *Friend*, 10 B. & Cr. 446; 9 Geo. 4, c. 14, s. 7. See *Bacon* v. *Simpson*, 3 Mee. & W. 85.]

(*a*) [It is to be observed, that in all cases of part performance, by work done, or delivery of goods, the value of the work or goods may be recovered on *a quantum meruit*. *Teall* v. *Auty*, *ante*, p. 293; and *Mavor* v. *Pyne*, 11 J. B. Moore, 2; where the circumstances were nearly identical with those in the case of *Boydell* v. *Drummond*, 11 East, 142.]

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[A *chose en action* does not seem to come within the description of goods and chattels in this clause. Thus it has been held that shares in a canal company are not within it; *Latham* v. *Barber*, 6 T. R. 67; (nor do they come within the clause relating to the sale of interests in land; see *Bradley* v. *Holdsworth*, 3 Mee. & W. 422, *ante*, p. 299; *Hibblewhite* v. *M'Morine*, 6 Mee. & W. 214; and *Bligh* v. *Brent*, 2 You. & C. 268); nor are shares in a joint-stock banking company; *Humble* v. *Mitchell*, 3 Per. & D. 141; 2 *Railw. Cas.* 70; nor, it seems, is stock in the British or foreign funds; see *Pickering* v. *Appleby*, Com. 354: *Mussell* v. *Cooke*, Pr. Ch. 533: *Crull* v. *Dodson*, Sel. Cas. Ch. 41: *Colt* v. *Nettervill*, 2 P. Wms. 304: *Pawle* v. *Gunn*, 6 Scott, 286. But foreign bonds and other securities transferable by delivery are perhaps saleable goods within the act. See *Att.-Gen.* v. *Bouwens*, 4 Mee. & W. 171. As to fixtures, see *Hallen* v. *Runder*, 1 Cr., M. & R. 266; *ante*, p. 296. An agreement to procure coals at A., and carry them to B., at a stipulated price, is not within this clause. *Cobbold* v. *Caston*, 8 J. B. Moore, 456. See *Astey* v. *Emery*, 4 Moo. & Sc. 262. An agreement that B. should have a half-interest in a race-horse, in consideration of £17, (half the price that A. had given for it), was held an agreement for the sale of goods, wares, or merchandizes, within the exception in the Stamp Act, 55 Geo. 3, c. 184; the indivisible nature of the chattel making no difference. *Marson* v. *Short*, 2 Scott, 243. As to crops, *vide ante*, p. 290.]

What are "goods, &c." within the 17th section.

What is a delivery.

[In order to satisfy the requisitions of the 17th section, it is not necessary that the goods should be actually delivered into the hands of the buyer; an unequivocal constructive delivery or acceptance is sufficient. Thus, delivery of the key of the warehouse in which the goods lie, or delivery of the goods to an agent or carrier appointed by the buyer, is a sufficient delivery; and any act of ownership exercised over them by the buyer, with the assent of the vendor, is a sufficient acceptance. See *Chaplin* v. *Rogers*, 1 East, 192: *Ryall* v. *Rolls*, 1 Atk. 171: *Elmore* v. *Stone*, 1 Taunt. 458: *Blenkinsop* v. *Clayton*, 7 Id. 597; 1 J. B. Moore, 328: *Astey* v. *Emery*, 4 Mau. & S. 262: *Howe* v. *Palmer*, 3 B. & Al. 321: *Tempest* v. *Fitzgerald*, Id. 680: *Carter* v. *Toussaint*, Id. 855: *Hanson* v. *Armitage*, 5 B. & Al. 557: *Maberley* v. *Shepherd*, 3 M. & Sc. 436: *Phillips* v. *Bistolli*, 2 B. & Cr. 511: *Hart* v. *Suttley*, 3 Camp. 528: *Bains* v. *Jevans*, 7 Car. & P. 288. As to the effect of marking the article, see *Hodgson* v. *Le Bret*, 1 Camp. 233: *Stoveld* v. *Hughes*, 14 East, 308: *Baldey* v. *Parker*, 2 B. & Cr. 37; 3 D. & Ry. 220; and as to giving a delivery order, see *Searle* v. *Reeves*, 2 Esp. N. P. 598:

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Delivery of goods.

Bentall v. *Burn*, 3 B. & Cr. 423. As to the right of returning the goods on account of defects, and as to delivery or acceptance expressly subject to approval, see *Coleman* v. *Gibson*, 1 M. & Rob. 168: *Acebal* v. *Levy*, 4 M & Sc. 217: *Kent* v. *Huskinson*, 3 B. & P. 233: *Jordan v. Norton*, 4 Mee. & W. 155. Acceptance of a sample is not sufficient, unless it can be considered as part of the goods purchased. *Talver* v. *West*, Holt, 178: *Hinde* v. *Whitehouse*, 7 East, 558: *Kilnitz* v. *Surrey*, 5 Esp. 267: *Cooper* v. *Elston*, 7 T. R.; 14 Sc.: *Johnson* v. *Dodgson*, 2 Mee. & W. 656: *Elliott* v. *Thomas*, 3 Id. 170. If goods of several kinds are included in one contract, acceptance of goods of one kind takes the whole out of the statute. *Elliott* v. *Thomas*, 3 Mee. & W. 170. See *Baldey* v. *Parker*, 3 D. & Ry. 220; 2 B. & Cr. 37, where various articles were purchased at a linendraper's shop at separate prices, each under £10, and it was held to be one contract, and within the statute. So, an agreement to return the goods on a contingency, and payment of a sum of money, is part of the original contract of sale, and the entire contract is taken out of the statute by delivery to the buyer in the first instance. *Williams* v. *Burgess*, 2 Per. & D. 422. See *Watts* v. *Friend*, 5 Man. & R. 439. If the vendor is in a situation to enforce his lien against the goods, that is a criterion of non-delivery. See *Baldey* v. *Parker*, 3 D. & Ry. 220: *Holderness* v. *Shackells*, 8 B. & Cr. 618: *Tansley* v. *Turner*, 2 Scott, 238. So, an act which would amount to a delivery, if the contract were complete, is not sufficient, if any term of the agreement remains to be settled. *Proctor* v. *Jones*, 2 Car. & P. 532.]

Vacating effect of the 17th sect.

[It has been already observed, that the 17th section, unlike the 4th, seems totally to *avoid* the contracts which do not conform to its requisitions, *ante*, p. 283, n.]

2. What signature is sufficient.

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Signature.]—[The regular way of signing by a corporation is, by its corporate seal. See *ante*, p. 304, and cases cited in *Wilmot* v. *Corporation of Coventry*, 1 You. & C. 518.]

As to signature by one part only.

[J. It was doubted by Lord *Redesdale*, whether a contract signed by one party alone could be enforced against him, there being no mutuality between the parties. *Lawrenson* v. *Butler*, 1 Sch. & Lef. 20: [and see *Boys* v. *Ayerst*, 6 Mad. 323.] But the notion is inconsistent with a stream of authorities. J.] [in which the contrary has been held, as to undertakings and guarantees within the 4th sec-

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tion, as well as to contracts for the sale of land and goods. See *Coleman* v. *Upcot*, 5 Vin. Ab. 527, pl. 17: *Hall* v. *Buller*, 1 Eq. Ab. 20: *Hatton* v. *Gray*, 2 Ch. C. 164: *Backhouse* v. *Mohun*, or *Crosby*, 2 Eq. Ab. 39; 3 Swanst. 434, n.: *Seton* v. *Slade*, 7 Ves. 265: *Fowle* v. *Freeman*, 9 Ves. 351: *Ormond* v. *Anderson*, 2 Ball & B. 370: *Bowen* v. *Morris*, 2 Taunt. 387: *Allen* v. *Bennet*, 3 Taunt. 169: *Rowe* v. *Osborne*, 1 Stark. 140: *Egerton* v. *Matthews*, 6 East, 307: *Boys* v. *Ayerst*, 6 Mad. 323: *Laythoarp* v. *Bryant*, 3 Scott, 249: *Owen* v. *Thomas*, 3 Myl. & K. 353. These authorities] [J. have established that it is enough that the contract is signed by the party to be charged, such being the terms of the Statute of Frauds. Both Sir *W. Grant*, (*Western* v. *Russell*, 3 Ves. & Bea. 187), and Sir *T. Plumer*, (*Martin* v. *Mitchell*, 2 Jac. & Walk. 427), have expressed their non-concurrence in Lord *Redesdale's* opinion. [And see 11 Ves. 591.]

Signature on one side.

Mutuality.

The answer given to the objection of the want of mutuality is, that the party seeking to enforce the performance of the contract has, by filing the bill, bound himself.J.] [" It is said," observed *Tindal*, C. J., in *Laythoarp* v. *Bryant*, 3 Scott, 249, " that there is a want of mutuality, the party charged by the agreement not having the full benefit of his adversary's liability by the same instrument. But whose fault is that? The defendant might, had he thought fit, have required the signature of the vendor. What is the object of the statute? According to the preamble, 'the prevention of fraudulent practices, which are commonly endeavoured to be upheld by fraud and perjury.' The whole object of the act is completely attained, when the agreement appears to bear the signature of the defendant, the party to be charged therewith. Then, it is said, that the word agreement imports a signature by both parties, and that, in the absence of such a signature by both, there is a want of mutuality. But here a little confusion arises between the consideration for the agreement, and the mutuality of claim or liability from the signature of the parties. I find no reason for saying that the signature forms part of the agreement. The agreement is, in fact, completed before either party is called upon to sign." The doctrine of the above cases applies as much to the 17th as to the 4th section, although in the former the word *parties* is used, while the latter has *party*. Ib. *Allen* v. *Bennet*, 3 Taunt. 169.]

Agreement must contain the names of both parties.

[But though a signature by both parties is not necessary, it is essential that the names of both parties should appear upon the memorandum or writing; *Champion* v. *Plummer*, 1 N. R. 252: see *Cooper* v. *Smith*, 15 East, 103: *Boyce* v. *Green*, Batty, 608: *Wheeler* v. *Collier*, 1 M. & Mal. 125; or upon some writing which

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can be connected with it. *Dobell* v. *Hutchinson*, 5 Nev. & M. 151: *Jacob* v. *Kirk*, 2 M. & Rob. 221: *Trueman* v. *Loder*, 3 Per & D. 267. But the signature of an agent would be sufficient without naming the principal. See *Graham* v. *Musson*, 7 Scott, 769, and *infra*, p. 321.] [J. It should seem, that, until some act has been done by the party who has not signed, to render the contract binding on him, it is open to the other party to retract; for there can be no contract, properly speaking, without a reciprocity of obligation. See 2 Jac. & Walk. 428: [*Palmer* v. *Scott*, 1 Russ. & M. 391: *Latch* v. *Wedlake*, 3 Per. & D. 499.] At all events, if he should refuse to sign, upon being required so to do, it is probable that the Court would not allow him afterwards to compel performance J.·.] [Where one of several persons on one side, who were to be bound by an agreement, refused to sign after his co-parties had signed, it was held to be a fit question for a jury to determine whether the parties who signed did so in the faith that the other would execute, and intended to bind themselves only on condition that he was bound also. *Latch* v. *Wedlake*, 3 Per. & D. 499. See *Elliot* v. *Davis*, 2 Bos. & P. 338: *Fletcher* v. *Dyche*, 2 T. R. 32: *Strangford* v. *Green*, 2 Mad. 228, which, it is to be observed, were all cases on *specialties*.]

Signature on one side.

Conditional signature.

[It has been decided, that if a man draw up an agreement, in his own handwriting, beginning—"I, A. B., agree, &c.," and leave a place for signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing, signed within the statute. *Knight* v. *Crockford*, 1 Esp. 187: *Ogilvie* v. *Foljambe*, 3 Mer. 62. See *Emmerson* v. *Heelis*, 2 Taunt. 38. "And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed" (*a*). Per Lord *Eldon*, 2 Bos. & P. 239. See *Johnson* v. *Dodgson*, 2 Mee. & Welsb. 659. And it is immaterial that the party writes his name in the third person. *Propert* v. *Parker*, 1 Russ. & M. 625: *Western* v. *Russell*, 3 Ves. & B. 187. Notwithstanding the above remark of Lord *Eldon*, it seems that it must appear from the circumstances that the terms of the agreement were understood to be finally settled, and the treaty concluded. *Bawdes* v. *Amhurst*, Pr. Ch. 402; 2 Ch. Rep. 284, (as to the dicta in which, see 3 Atk. 503). "The signa-

Signature, how to be made.

(*a*) [The same construction was put upon the 5th section of the Statute of Frauds, (which required wills of real estate to be signed by the testator), except in cases where it appeared that a more complete signature was intended. See 9 Ves. 248: *Right* d. *Price* v. *Cater*, Doug. 241; 18 Ves. 183.]

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Signature how to be made.

ture is to have the effect of giving authenticity to the whole instrument; and if the name is inserted *so as to have that effect*, I do not think it signifies much in what part of the instrument it is found. It is, perhaps, difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect. I do not understand how a name inserted in the body of an instrument, and *applicable* to *particular purposes*, can amount to such an authentication as is required by the statute." Per *Eyre*, B., *Stokes* v. *Moore*, 1 Cox, 223. In that case it was held, that the defendant was not chargeable upon a draft of instructions for preparing a lease, written by him, and containing his name, but not signed. The Court said that the memorandum might have been made subject to alterations; and, indeed, by the evidence it appeared that it did not contain the final agreement; and they distinguished the cases of wills, because the attestation there sufficiently shewed that the testator considered the will complete. (See *Right* v. *Cater*, Doug. 241). See 9 Ves. 249: *Hawkins* v. *Holmes*, 1 P. Wms. 770: *Morison* v. *Turnour*, 18 Ves. 175: *Ogilvie* v. *Foljambe*, 3 Mer. 62. So, delivery of the particulars of the property, signed by the vendor, although the terms of the contract are also written, is not binding. *Cook* v. *Tombs*, 2 Anst. 420: *Whaley* v. *Bagnell*, 1 Br. P. C. 345. The principle, however, laid down by *Eyre*, B., in *Stokes* v. *Moore*, does not seem to be quite correct. The question is not whether the party *intended* to bind himself, or to authenticate the writing by signing his name, but whether the writing, with his name occurring in it, is sufficient evidence that the agreement was made. Thus, the signing of letters by which the party never intended to bind himself, has been held to be a signing within the statute, and that even where the party wrote a letter to his own agent, setting forth the terms of an agreement as concluded by him (*a*). *Smith* v. *Watson*, Bunb. 55: *Owen* v. *Thomas*, 3 Myl. & K. 353. See *Welford* v. *Beazeley*, 3 Atk. 503: *Clerk* v. *Wright*, 1 Id. 12, n. The case of *Tawney* v. *Crowther*, 3 Br. C. C., affords a striking instance of the application of this principle. There an agreement was reduced to writing, but the defendant did not keep an appointment which he had made to sign it; and on being written to by the plaintiff's agent, urging him to sign

(*a*) [The case of *Ayliffe* v. *Tracey*, 2 P. Wms. (see also 9 Mod. 3) has been cited as contradicting this opinion. But there the judgment of the Court appears to have proceeded upon the consideration that there was no agreement at all; though it must be confessed that the terms of the letter in that case are not easily reconcilable with that conclusion.]

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Signature how to be made.

it, he replied by letter that there would be time enough until Michaelmas (when the *conveyance* was to be executed) to settle everything, and that his word should be as good as any security he could give; and it was held to be a good signing, on the ground that the agreement was admitted, although the signature was not. Lord *Redesdale*, who disapproved of this decision, because he considered that the meaning of the defendant was, "I will not bind myself, but you shall rely on my word," (1 Sch. & Lef. 33), seems to have forgotten that the agreement which the plaintiff sought to establish was not an agreement to be bound by writing, but the agreement to sell which had been completed by word of mouth (*ante*, p. 283), and to which the signature of the defendant, though required as evidence by the Statute of Frauds, was otherwise perfectly immaterial (*a*). See, also, *Allan* v. *Bower*, 3 B. C. C. 141. But of course a letter by which a party *abandons* an agreement which is set forth in an unsigned memorandum, cannot be used to set up that agreement. It is no *acknowledgment* of the *particulars* of such agreement. *Gosbell* v. *Archer*, 4 Nev. & M. 485. The doctrine of *Stokes* v. *Moore* does not apply to instructions regularly signed by the party, containing all the terms of the agreement, and delivered by him to his solicitor in order that a more formal instrument may be prepared. *Fowle* v. *Freeman*, 9 Ves. 351. See 1 Keen, 740.]

Printed name.

[If a man be in the habit of printing instead of signing his name, it seems he may be considered to sign by his printed name; per

(*a*) [Sir *W. Grant*, M. R., in *Randall* v. *Morgan*, where a letter written after a marriage was offered in proof of an agreement before marriage to give a portion, took a distinction between the 4th and 7th sections of the act, founded on the different words used in them. (*Vide infra*, on sect. 7). "Supposing that this letter refers to some parol promise before the marriage, I doubt extremely whether that would be sufficient to entitle the Court to construe this into an acknowledgment of a debt; for the promise being itself a nullity, producing *no* obligation, [*i. e.* for want of writing], a written recognition after the marriage would give it no validity, otherwise the construction of the 4th section of the statute would be just the same as the 7th, which requires only that a trust should be manifested by writing. Upon that clause it is not necessary that the trust shall be constituted by writing. It is sufficient to shew by written evidence the existence of the trust. But the 4th clause requires *the very agreement* to be in writing, and signed by the party to be charged therewith." The learned Judge then took another view of the case—that such a writing, to support a parol antenuptial agreement, would be fraudulent against creditors. (See 2 Cox, 235; 1 Eden, 55; and *infra*, Vol. 9, p. 71, 1st ed.) But it was not necessary to make a decision on either ground. Sir *W. Grant's* construction of the 4th section is obviously opposed, not only to the words of the act, but to numerous cases. See *Laythoarp*, v. *Bryant*, 3 Scott, 238, 256, and *ante*, pp. 283, 285.]

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Printed name.

Lord *Eldon*, C. J., in deciding that a bill of parcels in which the vendor's name was printed, given by him to the buyer at the time of receiving an order given for the future delivery of the goods, was at all events taken out of the statute by a letter signed by the vendor, and referring to the bill of parcels, with which it was connected by the jury. *Saunderson* v. *Jackson*, 2 Bos. & P. 238. It would be sufficient if the printing of the name were shewn to have been recognised by the party. Where the vendor wrote the name of the vendee on a bill of parcels on which his own name was printed, it was considered a sufficient signing to charge the vendor. *Schneider* v. *Norris*, 2 Mau. & S. 286.]

Signature as witness.

[Where one of the parties who is to be bound by an agreement subscribes the writing as a witness only, knowing the contents, it is sufficient to ratify the act. *Welford* v. *Beazeley*, 3 Atk. 530; 1 Ves. sen. 6. In deciding which case, Lord *Hardwicke* expressly admitted that the person whom he held to have bound himself by such signature, did not intend to do so. See 9 Ves. 251.]

Signature by initials, &c.

[A signature by initials seems to be sufficient. *Phillimore* v. *Barry*, 1 Camp. 513. See 3 Meriv. 245. But it has been held not sufficient that the party *identifies* himself merely under his own handwriting; he must either put his name to the writing or do some other act intended by him to be equivalent to an actual signature, such as, if he cannot write, making his mark; and a letter fully addressed, beginning "My dear Robert," and signed, "Your affectionate Mother," was held not to be properly signed. *Selby* v. *Selby*, 3 Meriv. 2. *Sed quære*—for these words were surely as significant a signature as a mark could have been, and were also intended to be a signature, which was not the case in many of the instances mentioned above.]

Agreement by several connected writings.

[Any writing which is not properly signed may be taken out of the statute by a subsequent writing, duly signed, in which it is referred to with sufficient certainty. *Tawney* v. *Crowther*, 3 Br. C.C. 318: *Saunderson* v. *Jackson*, 2 B & P. 238: *Phillimore* v. *Barry*, 1 Camp. 513: *Allen* v. *Bennet*, 3 Taunt. 169: *Jackson* v. *Lowe*, 7 J. B. Moore, 219: *Clinan* v. *Cooke*, 1 Sch. & Lef. 22: *Dobell* v. *Hutchinson*, 5 Nev. & M. 251: *Rose* v. *Cunynghame*, 11 Ves. 550: 3 Ad. & Ell. 355: *Blagden* v. *Bradbear*, 12 Ves. 466: *Western* v. *Russell*, 3 Ves. & B. 187: *Owen* v. *Thomas*, 3 Myl. & K. 353. But a deficiency in the internal evidence of connexion cannot be supplied by parol. *Hinde* v. *Whitehouse*, 7 East, 558: *Boydell* v. *Drummond*, 11 East, 142. See *Jacob* v. *Kirk*, 2 M. & Rob. 221, although of course the identity of the writing referred to may be so established.

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1 Sch. & Lef. 33. And where an agreement for a lease was drawn up with reference to certain clauses contained in a paper which was read to the plaintiff, who filed his bill for a specific performance, according to such clauses as were read to him, insisting that all had not been read, and the defendant insisted that they were all read, the bill was dismissed. *Brodie* v. *St. Paul*, 1 Ves. jun. 326. See 15 Ves. 522; 1 Sch. & Lef. 38. The witnesses must of course be consistent with each other and with the alleged agreement which they are produced to prove, for otherwise no complete agreement is made out. *Cooper* v. *Smith*, 15 East: *Smith* v. *Surman*, 4 Man. & Ry. 455. And parol evidence is admissible by way of *defence* to shew that the memorandum relied upon does not contain the true agreement. *Hinde* v. *Whitehouse*, 7 East, 558: *Clinan* v. *Cooke*, 1 Sch. & Lef. 22. See *Hoadley* v. *Maclaine*, 4 M. & Sc. 340: *Malins* v. *Freeman*, 2 Keen, 25. And this brings us to the cases in which an offer made by letter, stating all the terms of the contract and the subject-matter with sufficient distinctness, (*Seagood* v. *Meale*, Pr. Ch. 560: *Kennedy* v. *Lee*, 3 Mer. 441), and accepted on the other side, though without writing, has been held binding on the party making the offer, and also on the party accepting it, if his acceptance appear in writing with a sufficient signature, although a more formal agreement was contemplated. *Coleman* v. *Upcot*, 5 Vin. Abr. 527, pl. 17: *Huddlestone* v. *Briscoe*, 11 Ves. 583: *Dowling* v. *Maguire*, 1 Ll. & G. 182: *Thomas* v. *Dering*, 1 Kee. 729: *Chapman* v. *Bluck*, 5 Scott, 515. See *Howard* v. *Okeover*, 3 Swanst. 421, n. If a man being in company makes offers of a bargain, and then writes them down and signs them, and the other party takes them up and proffers his bill, this shall be a good bargain, and the other party shall be compelled to a specific performance (*a*). This, though it was not at first a contract, but conditionally only if the other would accept of it, yet when the other had accepted it, it was all one. *Coleman* v. *Upcot*. "It must be understood that the party seeking the specific performance of such an agreement is bound to find in the correspondence not merely a treaty, still less a proposal, for an agreement; but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that kind of acceptance which makes it no longer the act of one party, but of both. It follows that he is bound to point out to the Court upon the face of the correspondence a clear description of the subject-matter relative to

Agreement constituted by letters.

(*a*) [But the other party must act fairly, and not attempt a surprise or fraud on him who makes the offer. See *Knight* v. *Crockford*, 1 Esp. 189.]

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which the contract was in fact made and entered into. *I do not mean,* (because the cases which have been decided would not bear me out in going so far), *that I am to see that both parties really meant the same precise thing,* but only that both actually gave their assent *to that proposition, which, be it what it may,* de facto *arises out of the terms of the correspondence.* The same construction must be put upon a letter or series of letters that would be applied to the case of a formal instrument." Per Lord *Eldon,* C., *Kennedy* v. *Lee,* 3 Mer. 451. See *Ogilvie* v. *Foljambe,* Ib. 53. *Huddlestone* v. *Briscoe,* 11 Ves. 591: *Stratford* v. *Bosworth,* 2 Ves. & B. 341. If, therefore, in the answer to the offer any new term or any variation is proposed, the agreement remains open for either party to recede from it until such new proposal is accepted on the other side. To conclude the agreement, the new terms must be accepted: it is not sufficient that the party merely does not dissent from them. *Routledge* v. *Grant,* 1 Moo. & P. 717: *Smith* v. *Surman,* 4 Man. & Ry. 561: *Jordan* v. *Norton,* 4 Mee. & W. 155: *Holland* v. *Eyre,* 2 Sim. & St. 194. See *Popham* v. *Eyre,* Lofft, 786. If the proposal do not in itself evidence all the terms of the agreement by which the party signing it consents to be bound, but it require from the other party, not a simple assent to the terms stated, but a special acceptance, which is to supply a further term of the agreement, it is obvious that such special acceptance must be executed in writing, for otherwise the whole agreement will not be in writing as the statute requires. Per *Leach* V. C., *Boys* v. *Ayerst,* 6 Mad. 324, where it was left for the plaintiff to name a time for the removal of a certain building, upon which time the payment of the purchase-money by the defendant was to depend. "If a person communicate his acceptance of an offer within a reasonable time after the offer being made, and if within a reasonable time of the acceptance being communicated no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute. I apprehend, therefore, that it is not competent to the defendant to say I made my proposal on the 23rd, you propose terms of arrangement on the 26th, and do not finally agree to my proposal before the 28th, therefore this is no binding agreement between us." 3 Mer. 454.]

Acceptance of offer.

[If an offer is not accepted within a reasonable time (and what is a reasonable time must be determined with reference to the circumstances of each case), the right of accepting it will be considered to have been abandoned; and if an offer is met by a different proposal

the original offer is at an end, and the other party cannot retract his proposed variation and insist on the performance of the original offer. *Hyde* v. *Wrench*, at the Rolls, 1840, MS. The *contract* must be mutual, although the *evidence* of it need not be so, (*ante*, p. 313), and until an offer is accepted it may be retracted by the party making it; *Gaskarth* v. *Lord Lowther*, 12 Ves. 107; and if he has given a certain time to the other to consider, he may retract before that time has expired, if his offer has not been previously accepted. *Routledge* v. *Grant*, 1 Moo. & P. 717. When the defendants by letter offered to sell goods to the plaintiff on certain terms, *receiving an answer by return of post*, and misdirected their letter, in consequence of which the plaintiff received it two days later than he should have done, and he answered by return of post accepting the offer; but, the day following that on which the answer was expected by the defendants, they sold the goods to a third person, it was held that as the delay arose from their mistake, it must be taken, that as against them, the answer was received by return of post, and by that a valid agreement was constituted. *Adams* v. *Lindsell*, 1 B. & Al. 681. It was attempted to be argued that even independently of the delay the defendants might have retracted their offer at any time before the acceptance of it was notified to them: but the Court said that if that were so, no contract could ever be completed by post, for if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it, and so it might go on *ad infinitum*. *The contract is completed by the acceptance of it.* See 1 Moo. & P. 733: *Reed* v. *Deere*, 7 B. & Cr. 263. As to when a request for an answer by return of post is part of the offer, see *Johnson* v. *King*, 9 J. B. Moore, 482.]

Acceptance of offer.

Time for accepting offer.

[The first and third sections of the Statute of Frauds require the appointment of an agent signing within those sections, to be made by writing; but the words *by writing* are omitted in the 4th and 17th sections, and therefore, although the contract itself under either of these sections must be in writing, it may be made by an agent under a parol authority only. But see *Walters* v. *Morgan*, 2 Cox, 369: *Hendon* v. *Cox*, 5 Vin. Ab. 524, pl. 45: *Wedderburne* v. *Carr*, Exch. T. T. 1775, cit. 3 Wood. Lect. 427: *Graham* v. *Musson*, 7 Scott, 769. So Lord *Eldon*, in *Coles* v. *Trecothick*, said it was clearly settled that an agent need not be authorised in writing. See *Clinan* v. *Cooke*, 1 Sch. & Lef. 22: *Barry* v. *Lord Barrymore*, Ib. 28, cit. *Field* v. *Boland*, 1 Dr. & Walsh, 37. But a mere parol authority

Signature by agent.

Agent may be appointed by parol.

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should never be given or acted upon, on account of the difficulty of making out that it has been given, and the agent has acted consistently with it. Thus, where the plaintiff relied upon a verbal authority to sell, given by trustees to the party from whom he purchased, Lord *Eldon*, C., said, that in order to make it the contract of the trustees, the plaintiff must prove that they did by parol authorise the agent without further consultation with them to sell at that price. Admitting that if they left the price entirely to his discretion, it was sufficient, in a question between them and the purchaser, it must be shewn that the same authority was given specifically by all the trustees or by some one empowered expressly and clearly to pledge their authority. *Mortlock* v. *Buller*, 10 Ves. 311. So proof of an authority to sell is not proof of authority to receive the money. *Mynn* v. *Joliffe*, 1 Mood. & R. 326: *Sykes* v. *Giles*, 5 Mee. & W. 645. See *Jordan* v. *Norton*, 4 Mee. & W. 155. That the drawing up of the terms of a contract by the solicitor for one of the parties, and the sending of the drafts to a conveyancer to be settled, after they have been read to and approved by both parties, is not such an agency as can bind either side, see *Earl of Glengall* v. *Barnard*, 1 Keen. 769. In *Daniel* v. *Adams*, Ambl. 495, husband and wife having a joint power to sell an estate of the wife's, gave a verbal authority to an agent to sell by auction; he sold by *private contract* for a greater sum than the *husband* alone had written to him to say he would take, and it was held that the purchaser could not compel a performance. See *Charlewood* v. *Duke of Bedford*, 1 Atk. 497: 5 Vin. Ab. 522, pl. 35: *Wyatt* v. *Allen*, 3 Sugd. Vend. App., No. 9. The agent is competent to prove the terms of his authority, but his evidence, if it go to discredit his signature as agent, will be regarded with suspicion. If he declare that he has no authority at the time he signs, his principal will not be bound. *Howard* v. *Braithwaite*, 1 Ves. & Bea. 202, 374. And see *Mason* v. *Armitage*, 13 Ves. 27. And here a difference may be noticed between the effect of admissions by an agent and that of admissions by the principal. The principal will always be bound by his own admission, but the admission of an agent is not binding on his principal unless it can be treated as being itself a lawful act of agency at the time. It cannot be relied on as conclusively establishing against the principal the fact of a prior contract having been made by the agent. So far as it is an act of agency, an admission by an agent binds the principal; so far as it relates to a prior act of agency, it is only *evidence* against him. *Fairlie* v. *Hastings*, 10 Ves. 123. See *Bauerman* v. *Radenius*, 7 T. R. 663. Although a written contract cannot be varied by parol

Extent of agent's authority.

Effect of admissions by agent.

Proof of agency.

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yet it may be shewn by parol testimony that a person treated in the written memorandum as principal was agent for another. *Wilson* v. *Hart*, 7 Taunt. 295: 1 J. B. Moore, 45; *Sims* v. *Bond*, 2 Nev. & M. 608: *Jones* v. *Littledale*, 1 Nev. & P. 677: *Marston* v. *Roe* d. *Fox*, 2 Nev. & P. 504, 519, 530: *Trueman* v. *Loder*, 3 Per. & D. 267. See *Bartlett* v. *Pickersgill*, 1 Cox, 15, where Lord Keeper *Henley* decided against the admission of such evidence, it not being charged that any part of the purchase-money was paid by the plaintiff. See *Magee* v. *Atkinson*, 2 Mee. & W. 440.]

Agent cannot act by deputy.

[An agent who has a particular authority to sell cannot delegate his authority, so as to authorise his clerk to contract, unless there is a special agreement (either in writing or oral) for the purpose. *Coles* v. *Trecothick*, 9 Ves. 234: *Blore* v. *Sutton*, 3 Meriv. 237: *Henderson* v. *Barnwall*, 1 You. & C. 387. See *Gosbell* v. *Archer*, 4 Nev. & M. 485. But the act of the clerk may be afterwards ratified by the agent; 3 Mer. 247: *Maclean* v. *Dunn*, 1 Moo. & P. 761.]

One person may be agent for all parties.

[The agent must be some third person, and cannot be the other contracting party. *Wright* v. *Dannah*, 2 Camp. 203; (a decision on the 17th section). See *Farebrother* v. *Simmons*, 5 B. & Al. 33, *infra*, p. 325: *Dryden* v. *Frost*, 3 M. & Cr. 670. But the same person may be agent for both parties. *Hicks* v. *Hankin*, 4 Esp. 164: *Graham* v. *Musson*, 7 Scott, 769; and as to auctioneers, *infra*, p. 324.]

Revocation of agent's authority.

[The principal may revoke the authority of the agent at any time before an agreement is executed according to the statute, notwithstanding the agent has completed a *verbal* agreement; for the authority contemplated by the statute is not an authority to *contract*, but an authority to *sign* for the principal. See *Farmer* v. *Robinson*, 2 Camp. 339, n.: *Short* v. *Spackman*, 2 B. & Ad. 962. On the other hand it is settled, that the agent's authority need not exist at the time he makes his signature; it is sufficient if the contract be afterwards verbally adopted by the person indicated as principal; for *omnis ratihabitio retrotrahitur et mandato æquiparatur*. *Maclean* v. *Dunn*, 1 Moo. & P. 761: *Kilnitz* v. *Surrey*, Paley, Prin. & Ag. 143, n., 2nd ed.: *Soames* v. *Spencer*, 1 Dowl. & Ry. 32: *Gosbell* v. *Archer*, 4 Nev. & M. 485. See further, title, POWER OF ATTORNEY, *post*.]

Brokers.

[On a sale transacted through the medium of a broker, he is the agent of both parties, and the bought and sold notes, signed and delivered by him to the buyer and seller respectively, constitute the proper evidence of the contract, and are binding, although there is no memorandum in the broker's book. *Rucker* v. *Cammeyer*, 1 Esp. 105: *Anon.* Lofft, 330: *Chapman* v. *Partridge*, 5 Esp. 256: *Cum-*

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ming v. *Roebuck*, Holt, 172: *Grant* v. *Fletcher*, 8 Dowl. & Ry. 59: 5 B. & Cr. 456: *Groom* v. *Aflalo*, 9 Dowl. & Ry. 148; 6 B. & Cr. 117: *Thornton* v. *Meux*, 1 M. & Mal. 43: *Hawes* v. *Forster*, 1 Mood. & P. 368. And if the names of the parties appear from both notes together, it is sufficient. *Trueman* v. *Loder*, 3 Per. & D. 267. It was at one time thought that the broker's book was the proper evidence of the contract. See *Thornton* v. *Meux*, *Grant* v. *Fletcher*. The contract is nevertheless completed by the signed entry in the broker's book, or by any other writing or writings properly connected and signed within the statute, so that the parties cannot afterwards recede from it; and the want of proper bought and sold notes is not then material. *Heyman* v. *Neale*, 2 Camp. 337: *Pauli* v. *Simes*, 6 Car. & P. 506. See *Farmer* v. *Robinson*, 2 Camp. 339 n.: *Gale* v. *Wells*, 1 Car. & P. 388. If the bought and sold notes disagree as to any material part of the contract, it will not be enforced, and an unsigned entry in the broker's book will not supply the defect. *Thornton* v. *Kempster*, 1 Marsh, 355; 5 Taunt. 786: *Grant* v. *Fletcher*, 8 D. & Ry. 59. See *Maclean* v. *Dunn*, 1 Moo. & P. 761. Evidence of mercantile usage is admissible to explain an apparent variance between the notes. *Bold* v. *Rayner*, 1 Mee. & W. 343. In *Thornton* v. *Meux*, a variance between the bought and sold notes was not allowed to be explained by reference to the broker's book, which, it is presumed, though not so stated, was signed. But in *Gale* v. *Wells*, where bought notes were delivered to each party, and the buyer's name was not mentioned in them, the defect was allowed to be supplied by reference to the book; 1 Car. & P. 388. A note, signed by either of the principals, will be enforced against him, notwithstanding a variance between it and the note delivered to him. *Rowe* v. *Osborne*, 1 Stark. 140. An error in the memorandum that is proved to be immaterial, will not avoid the contract; as, where the broker wrote down the old name of the firm after a change had taken place, of which he was ignorant. *Mitchell* v. *Lapage*, Holt. 253. A material alteration in either note, without the consent of the other party, will discharge him. *Powell* v. *Divett*, 15 East, 29.]

Signature by auctioneer.

[An auctioneer is of course the agent of the vendor, and may bind him by his signature. *Hinde* v. *Whitehouse*, 7 East, 557; and it is now settled, contrary to former decisions and opinions (*a*), that in sales of lands, as well as of goods, the bidding of the pur-

(*a*) [See *Stanifield* v. *Johnson*. 1 Esp. 101. *Walker* v. *Constable*, 2 Id. 659; 1 Bos. & P. 306: *Buckmaster* v. *Harrop*, 7 Ves. 341; 13 Id. 35, 456, 473: *Coles* v. *Trecothick*, 9 Id. 234, 249.]

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chaser constitutes him the purchaser's agent also; and that his writing down the purchaser's name is a signature as such agent, and this, although the bidder himself is only an agent. *Emmerson* v. *Heelis*, 2 Taunt. 38: *White* v. *Proctor*, 4 Ib. 209: *Kemeys* v. *Proctor*, 3 Ves. & B. 57; 1 Jac. & W. 250, *S. C.*: *Farebrother* v. *Prattent*, 1 Dan. 64; *Kenworthy* v. *Schofield*, 4 Dowl. & Ry. 556; 2 B. & Cr. 945. See *Coles* v. *Trecothick*, 9 Ves. 249; 1 Keen, 788. And it seems if the name of the owner of the estate is not disclosed at the sale, the auctioneer's signature binding himself is necessary, in addition to that of the buyer, in order to complete the agreement, for otherwise the name of the vendor does not appear. *Wheeler* v. *Collier*, 1 M. & Mal. 125. The auctioneer, however, is not, *ex vi termini*, agent for both parties: whether such agency shall be inferred depends upon the facts of the particular case. Thus, where an executor agreed with a legatee previously to a sale by auction of the testator's goods, that the latter might purchase goods to any amount, not exceeding the legacy, and that it should go towards payment of it, and by the conditions of sale the purchasers were to pay a per centage of the price at the sale, and the rest on delivery; and the legatee's name was written down by the auctioneer as the purchaser of certain lots; it was held, that the bargain with the executor might be given in evidence, in an action for the price of the goods, notwithstanding the printed particulars of sale. *Partlett* v. *Purnell*, 6 Nev. & M. 299; 4 Ad. & Ell. 792.]

Signature by auctioneer.

Implication of agreeing may be rebutted.

[The signature by the auctioneer's clerk is sufficient. The auctioneer and his clerk may be considered as the constituted agents of the vendor: he appoints the former to announce the biddings and the latter to take down the names of the purchasers and the prices of the lots. The clerk may be considered not only as the agent of the vendors but also of the purchasers. By their silence when the hammer falls he has then authority to execute the contract on their behalf. *Bird* v. *Boulter*, 1 Nev. & M. 317. See *Malins* v. *Freeman*, 2 Keen, 25.]

Signature by auctioneer's clerk.

[In an action by the auctioneer himself, (see *Williams* v. *Millington*, 1 H. Bl. 81), it was held, on the authority of *Wright* v. *Dannah*, 2 Camp. 203, *ante*, p. 323, that the auctioneer, suing as principal, could not insist on his signature as agent for the defendant. *Farebrother* v. *Simmons*, 5 B. & Al. 333. In *Bird* v. *Boulter*, the plaintiff was the auctioneer, but as the signature had been made by his clerk, there was no occasion to interfere with *Farebrother* v. *Simmons*. But *Littledale*, J., said, "I do not see why the clerk should not be the agent of both parties; nor indeed do I see why

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the auctioneer himself should not sign as agent of the contracting party. It is certainly irregular that the contracting parties should act as each other's agents, but it is very different where the contract is signed by an individual who is not either of the contractors. Were it to be held otherwise, no broker could maintain an action in his own name for the breach of a contract signed by him."]

Signature by clerk as witness.

[But where the plaintiff purchased lands at an auction, and signed a memorandum of the contract, which J. N., the auctioneer's clerk, also signed *as witness*, and J. N., being authorised to do so, received the deposit, and half the auction duty, according to the conditions of sale, and signed a receipt for them for the auctioneer, it was held that the clerk could not be treated as agent for the vendor; he could not sign both as witness and as party, and his signature purported to be made in the former character. He might have known nothing of the particulars of the contract. *Gosbell* v. *Archer*, 4 Nev. & M. 485; 2 Ad. & E. 500. See 9 Ves. 251, and *ante*, p. 318.]

Agreement signed by auctioneer must be complete.

[In order to bind the parties, the agreement to be signed by the auctioneer must be in all respects a complete agreement, just as much as in other cases. Thus, where the auctioneer wrote the purchaser's name against the lots purchased by him, in a catalogue, without more, the catalogue not being annexed to the conditions of sale, nor containing any reference to them, it was held that the conditions might be given in evidence to prove that the true contract was not contained in the memorandum, and that there was not a sufficient memorandum to satisfy the 17th section. *Hinde* v. *Whitehouse*, 7 East, 558: *Kenworthy* v. *Schofield*, 4 Dowl. & Ry. 556; 2 B. & Cr. 945. So the auctioneer's receipt for the deposit, if it do not shew the terms of the sale, is insufficient. *Blagden* v. *Bradbear*, 12 Ves. 466.]

3. Statement of consideration for agreement, &c.

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Statement of consideration.]—[In the case of *Rann* v. *Hughes*, 7 T. R. 350, *in notis*, *Skynner*, C. B., in delivering the opinion of the judges to the House of Lords, observed, that the law of this country supplies no means, nor affords any remedy to compel the performance of an agreement made without sufficient consideration.

Consideration to support a contract.

Such agreement is *nudum pactum, ex quo non oritur actio;* and writing makes no difference; for, that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England.

Two classes of contracts only.

All contracts are by the law of England distinguished into agreements by specialty and

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agreements by parol; nor is there any such third class as *contracts in writing*. If they be merely written, and not specialties, they are parol, and a consideration must be proved. The words of the Statute of Frauds are merely negative, and still leave the agreement liable to be tried and judged of as all other agreements merely in writing are by the common law. *Eastwood* v. *Kenyon*, 3 P. & D. 282.]

In preparing written agreements, consideration should be stated.

[J. In preparing agreements, therefore, which are required by statute to be in writing, care should be taken to express the consideration; for, according to the doctrine of several cases, this, being essential to the validity of the agreement, cannot be supplied by oral testimony; and the consideration should be such as to operate as a *present* inducement to the obligation contracted, or, in other words, should refer to something *about* to be done, and not be a past and by-gone consideration; [*Wood* v. *Benson*, 2 Cr. & J. 95: *Haigh* v. *Brooks*, 2 Per. & D. 477: *Raikes* v. *Todd*, 1 Per. & D. 138]; though unquestionably, in some of the cases, the instrument seems to have been supported by a consideration of the latter species. *Boehm* v. *Campbell*, 3 J. B. Moore, 15; *Pace* v. *Marsh*, 8 Id. 59. It is not possible, indeed, to reconcile all the cases upon the subject. See *Wain* v. *Warlters*, 5 East. 10; (but as to which see *ex parte Minet*, 14 Ves. 190: *Ex parte Gardom*, 15 Id. 288; and see 10 J. B. Moore, 406): *Lyon* v. *Lamb*, Fell's Merc. Guar. 260: *Stadt* v. *Lill*, 9 East, 348: *Jenkins* v. *Reynolds*, 6 J. B. Moore, 86; 3 Br. & B. 14: *Saunders* v. *Wakefield*, 4 Id. 595: *Boehm* v. *Campbell*, 3 J. B. Moore, 15: *Stead* v. *Liddard*, 8 J. B. Moore, 2: *Pace* v. *Marsh*, Id. 59; 1 Bing. 216: *Morley* v. *Boothby*, 10 J. B. Moore, 395; 3 Bing. 107:J.] [*Clancy* v. *Pigott*, 4 Nev. & M. 496; 2 Ad. & El. 473: *Cole* v. *Dyer*, 1 Cr. & J. 461; *Bushell* v. *Beavan*, 4 M. & Sc. 622: *Hawes* v. *Armstrong*, 1 Scott, 661: *James* v. *Williams*, 3 Nev. & M. 196; 5 B. & Ad. 1109: *Raikes* v. *Todd*, 1 Per. & D. 138: *Bentham* v. *Cooper*, 5 Mee. & W. 621. As to a promise by an executor or administrator to answer damages out of his own estate, see *Rann* v. *Hughes*, 7 T. R. 350, n; 4 Br. P. C. 27, Toml. ed.; Selw. N. P. 849, 9th ed.; *Tomlinson* v. *Gill*, Ambl. 330.] [J. But certainly the leaning of the latter cases has been in favour of requiring the consideration to be stated. In *Morley* v. *Boothby* the undertaking was in these words: "Messrs. *M. & Co.*, we hereby promise that your draft on *Wm. Clarke, Son & Co.*, due at *Messrs. Mastermans'*, at six months, on the 27th of November next, shall be then paid out of money to be received from St. Philip's Church; say amount 174*l.* 13*s.* 5*d.* *W. Clarke, W. Boothby.*" It was held, that as there was no apparent benefit accruing to the debtors,

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Statement of consideration.

nor any inconvenience sustained by the creditors, in consequence of this arrangement, it was without consideration on the face of it, and therefore the plaintiff could not recover. Where the act requires an "acknowledgment" only to be in writing, it is apprehended that the principle of the preceding cases does not apply.[J.] [The recent cases have conclusively settled the rule in accordance with the decision in *Wain* v. *Warlters*, that the consideration must appear on the face of the writing, or be deducible by reasonable intendment from its terms; the ground of the decisions being, that the term *promise* in the statute, as explained by the use of the word *agreement* in the concluding part of the clause, includes both the consideration for the promise and the promise itself. "It is not, however, necessary that such consideration should appear in *express terms;* it would undoubtedly be sufficient in any case, if the memorandum were so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum would be sufficient to satisfy the statute. But there must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the consideration stated in the declaration, and no other than such consideration, was intended by the parties to be the ground of the promise." Per *Tindal*, C. J., *Hawes* v. *Armstrong*, 1 Scott, 668: *Bentham* v. *Cooper*, 5 Mee. & W. 621. For instances in which the consideration has been implied from the terms of a guarantee, (upon contracts of which nature most of the cases have arisen), see *Russell* v. *Moseley*, 6 J. B. Moore, 521: *Stadt* v. *Lill*, 9 East, 348: (where, from the following undertaking, "I guarantee the payment of any goods which Mr. S. shall deliver to Mr. N.," it was collected that the promise was made as an inducement to the furnishing of the goods): *Lysaght* v. *Walker*, 5 Bligh, 1: *Newbury* v. *Armstrong*, 3 Moo. & P. 509: *Ryder* v. *Curtis*, 8 Dowl. & Ry. 62: *Shortrede* v. *Cheek*, 3 Nev. & M. 366: *Dutchman* v. *Tooth*, 7 Scott, 710: *Kennaway* v. *Treleavan*, 5 Mee. & W. 498. A contingent consideration is sufficient (*a*); but of course the liability upon the guarantee does not arise until the condition is performed. *War-*

(*a*) [This must be understood of a consideration for the entire promise; for a mere promise to pay the existing debt of A., and also future advances to him, does not seem to be good as to the past debt; since the future advances are, unless otherwise expressed, presumed to be only a consideration for the promise to pay *them*. See *Russell* v. *Moseley*, 6 J. B. Moore, 521: *Raikes* v. *Todd*, 1 Per. & D. 138: *Wood* v. *Benson*, 2 Cr. & J. 95, and *ante*, p. 308.]

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rington v. *Furbor*, 6 Esp. 89: *Stadt* v. *Lill*, 9 East, 343: *Hemming* v. *Trenery*, 2 Cr. M. & R. 385. From this dependence of the liability under the guarantee on the performance of the consideration, it follows that the agreement must shew not only that there is a consideration, but also what the consideration is. "If in such a written agreement to be answerable for the debt of another person, two distinct considerations may with equal propriety be inferred as the inducement for that engagement, the writing is not taken out of the operation of the Statute of Frauds." Per Lord *Lyndhurst*, C. B. *Cole* v. *Dyer*, 1 Cr. & J. 464. See *Shortrede* v. *Cheek*, 3 Nev. & M. 866.]

What a sufficient consideration.

[The forbearance of an existing debt is, of course, a good present consideration. *Fish* v. *Hutchinson*, 2 Wils. 94: *Kirkham* v. *Master*, 2 B. & Al. 613. "An express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision." (Note to *Wennall* v. *Adney*, 3 Bos. & P. 249). Thus, if the abandonment of a contract is relied upon as the consideration for an agreement, it must be shewn that there was a valid contract. *Walker* v. *Constable*, 1 Bos. & P. 306; 3 Nev. & P. 282, (*vide ante*, p. 285). This principle obviously applies as much where the promise is founded on the supposed liability of a third person, as where it is founded on that of the party himself who promises. Any damage, or any suspension or forbearance of his right, or any possibility of loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise and will make it binding, although no actual benefit accrues to the party undertaking. 1 Wms. Saund. 211, n. *b*. See *Dutchman* v. *Tooth*, 7 Scott, 710: *Emmett* v. *Kearns*, Ib. 687: *Perte* v. *Dicken*, 1 Cr. M. & R. 422: *Herring* v. *Dorell*, 8 D. P. C. 604. (But see *Haigh* v. *Brooks*, 2 Per, & D. 477: 10 Ad. & E. 309, as to whether a benefit to the party undertaking without any damage to the plaintiff is not sufficient). Therefore a promise to the *debtor* to pay his debt is not within the clause. *Eastwood* v. *Kenyon*, 3 Per. & D. 276: *Rattenbury* v. *Fenton*, 3 Myl. & K. 505. A promise to indemnify the plaintiff from the consequence of becoming bail for a third person is within the clause. *Green* v. *Cresswell*, 10 Ad. & E. 453; 2 Per. & D. 430. See further, as to the consideration requisite to support an assumpsit, *Eastwood* v. *Kenyon*, 3 Per. & D. 276, and cases there cited.]

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As to statement of consideration, in memorandum of bargain under sect. 17.

[In the 17th section, the word *agreement* does not occur; but a memorandum or note of the *bargain* is required; and from this difference between the wording of the 4th and the 17th sections, it has been held, that the terms of the bargain are not required to be so distinctly expressed under the latter clause, as those of the agreement must be under the former. Thus, in an action on the following memorandum:—"We agree to give Mr. E. 19*d.* per lb. for thirty bales of Smyrna cotton, customary allowance, cash three per cent. as soon as our certificate is complete; (signed) M. & T.", and dated; it was objected, that the contract was executory, and that no consideration appeared on the writing for the promise, nor any mutuality in the engagement. But the Court distinguished the case of *Wain* v. *Warlters*, on the ground of the different wording of the 4th section, and held the memorandum sufficient. *Egerton* v. *Matthews*, 6 East, 307. But the price agreed to be paid constitutes an essential part of the bargain. "If it were competent to a party to prove by parol evidence the price intended to be paid, it would let in much of the mischief which it was the object of the statute to prevent." *Elmore* v. *Kingscote*, 5 B. & Cr. 584; 8 Dowl. & Ry. 344. (See 2 B. & Cr. 633). In that case the parol evidence shewed that the contract was for the sale of the goods at a fixed price; but if the contract is for the sale of the goods at a reasonable price, or at the market value, then, of course, a memorandum, stating as much, will be a memorandum *of the bargain*, sufficient to satisfy the act. And even where the memorandum is not thus explicit, and merely omits any mention of the price, the statute will be satisfied, if it can be presumed from the nature of the bargain that no fixed price, but a reasonable value, was agreed upon. *Hoadly* v. *Maclaine*, 4 Moo. & Sc. 340. See *Acebal* v. *Levy*, Id. 217; and as to contracts for the sale of land by valuation, &c., see *Cooth* v. *Jackson*, 6 Ves. 17: *Milnes* v. *Gery*, 14 Ves. 408: *Blundell* v. *Brettargh*, 17 Ves. 234. But parol evidence would be admissible, it seems, to shew that a fixed price was agreed upon; and then the agreement would fail. *Hoadley* v. *Maclaine; vide ante*, p. 309. Of course a statement of the price is equally essential in agreements which come under the 4th, as in those which are regulated by the 17th section. *Clerk* v. *Wright*, 1 Atk. 12: *Blagden* v. *Bradbear*, 12 Ves. 466: *Milnes* v. *Gery*, 14 Ves. 408.]

Statement of price.

Contract for sale at a *reasonable* price.

All the terms of the agreement must be reduced to writing.

Certainty of the Agreement.]—[With respect to agreements for sales of real estate, the writing which is relied upon to establish an agreement must, by its own contents, state the terms of the agree-

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Certainty of the agreement.

ment, describe the property sufficiently, and state the price to be given for it, and the terms upon which it is given and received; or, if its own inherent contents are not sufficient to evidence so much, it must, by its contents, refer to some other instrument, containing the terms of the agreement, so that, by its contents, the whole agreement may be ascertained. Very nice and difficult questions may arise upon that; how far a paper of this sort will take a case out of the statute, if you are obliged to make out all these particulars by parol evidence. 9 Ves. 251. As to the certainty which is requisite to an agreement, see also *Clerk* v. *Wright*, 1 Atk. 12: *Popham* v. *Eyre*, Lofft, 786, 801: *Allen* v. *Harding*, 2 Eq. Ab. 17: *Benstead* v. *Coleman*, Bunb. 65: *Rose* v. *Cunyngham*, 11 Ves. 550: *Stokes* v. *Moore*, 1 Cox, 219: *Blore* v. *Sutton*, 3 Mer. 237: *Collett* v. *Butler*, 3 Swanst. 402; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22: *Lindsay* v. *Lynch*, 2 Id. 1: *Harnet* v. *Yielding*, Id. 549: *Clowes* v. *Higginson*, 1 Ves. & B. 524: *Blore* v. *Sutton*, 3 Mer. 237: *Kenworthy* v. *Schofield*, 4 D. & Ry. 556: *Richards* v. *Porter*, 9 D. & Ry. 497: *Price* v. *Assheton*, 1 You. & C. 441: *Hutchinson* v. *Bowker*, 5 Mee. & W. 535. If the written agreement does not contain all the terms actually agreed upon when it was made, performance of it will not generally be enforced, unless the party asking for such performance consents to take it, with the addition of the omitted provisions.—As to the effect of parol evidence in controlling written instruments, *vide infra*, sect. 5.]

4. DECLARATIONS OF TRUSTS WITHIN THE SEVENTH SECTION.

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What trusts within the statute.

[The seventh section applies to chattels real, (*Riddle* v. *Emerson*, 1 Vern. 108, but not to a share in a mining copartnership, *Forster* v. *Hale*, 5 Ves. 308, nor to money secured by mortgage, *Benbow* v. *Townsend*, 1 Myl. & R. 506); to copyholds, (assumed in *Withers* v. *Withers*, Amb. 151, *Goodwright* d. *Langfield* v. *Hodges*, 1 Watk. Cop. 227, *Acherley* v. *Acherley*, 7 Br. P. C. 273. *Devenish* v. *Bains*, Pr. Ch. 5; 2 Eq. Ab. 43, c. 4, where it was agreed that copyholds were not within the act, was decided on the ground of fraud; but the Court thought that as an estate might by the custom be created by parol, a trust might also be so created (*a*)); and

Copyholds.

(*a*) [But as to this, see *Riddle* v. *Emerson*, 1 Vern. 108; Eq. Ab. 381, pl. 3, where it was held, that though a lease for three years might be granted by parol, the trust of such lease could not be declared by parol. A surrender of copyholds to the use of the tenant's will enabled him to pass the estate by an unsigned and unattested will; the words, "last will in writing," in the 7th section, being considered to be satisfied by such a will. *Doe* d. *Cook* v. *Danvers*, 7 East, 299. The 5th section, relating to wills, is not so

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to charitable trusts, *Lloyd* v. *Spillet*, Barnard. 384: 2 Atk. 148: *Adlington* v. *Cann*, 3 Atk. 141: *Boson* v. *Statham*, 1 Eden, 513. But the Crown, it seems, not being named, is not bound by the statute. *Rex* v. *Portington*, 1 Salk. 162. See *Adlington* v. *Cann*, 3 Atk. 147, 154, and *infra*, Vol. 5, p. 71. Personal estate is not within the clauses relating to trusts. *Benbow* v. *Townsend*, 1 Myl. & K. 506: see *Gibbons* v. *Caunt*, 4 Ves. 847.]

Uses.

[Uses which are executed by the statute were said by Lord *Hardwicke* not to be within this clause; 1 P. Wms. 112; but in *Lord Altham* v. *Earl of Anglesey*, Gilb. Eq. Rep. 16: and in *Roe* d. *Roach* v. *Popham*, Doug. 25, it was held that a resulting use might be rebutted by parol. See cas. temp. *Holt*, 733. Uses seem to fall within the first section. See *Wright* v. *Lord Cadogan*. 2 Eden, 257.]

What is a sufficient declaration of trust.

[It is not required by the statute that a trust should be *created* by writing, but that it shall be manifested and proved by writing. It is not necessary that the trustee should have been such from the first; it is sufficient if it appear at any time in writing under the hand of a person having a right to declare himself a trustee. Per Lord *Alvanley*, *Forster* v. *Hale*, 3 Ves. 707. See *Ambrose* v. *Ambrose*, 1 P. Wms. 321: *Ryall* v. *Ryall*, Amb. 413, 2 Eden, 257, 12 Ves. 74. The trust may be proved, in the same manner as agreements under the fourth section, by letters or other detached and informal writings, clearly connected with each other and properly signed, and leaving no doubt as to all the terms of the trust. *Forster* v. *Hale*: *O'Hara* v. *Neill*, 7 Br. P. C. 277: *Stubbs* v. *Sargon*, 2 Keen, 255. So a trust may be evidenced by a recital in a deed executed by the trustee, *Deg* v. *Deg*, 2 P. Wms. 412, or by his answer to a bill, &c., *Duke of Norfolk* v. *Browne*, Pr. Ch. 80: *Hampton* v. *Spencer*, 2 Vern. 288; 1 Atk. 59: and in *Cottington* v. *Fletcher*, 2 Atk. 155, a trust was enforced upon the confession in the answer, though coupled with a plea of the Statute of Frauds. (See the cases upon the 4th section, which seems distinguishable, *ante*, p. 302). In *Moore* v. *Edwards*, 4 Ves. 23, Lord *Loughborough*, C., apparently alluding to this case, says that it is completely misstated, and that from Lord *Hardwicke's* notes it appears that he decided on the ground that the agreement

worded as to include copyholds devisable by the general custom. 2 Br. C.C. 58. A devise of an equitable interest in copyholds was clearly within the 9th section, and required the will to be written, though not signed. See *Anon.* 2 P. Wms. 259, n.: *Tuffnell* v. *Page*, Id. 261, n.; 2 Atk. 37; 1 Dick, 76: *Carey* v. *Askew*, 1 Cox, 243. Mr. *Watkins*, who contends that a nuncupative will would pass the legal estate in copyhold, has overlooked the 1st section, which appears to include copyholds. See 3 Rep. 8; Hard. 432.]

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had been executed. As to declarations of trust in connexion with testamentary acts, and the effect of fraud in excluding the statute, see cases cited *infra*, tit. Wills, and in *Podmore* v. *Gunning*, 7 Sim. 644.]

Parol proof of trusts.

[A trust may be proved by parol, notwithstanding the statute, if it be made out by *written* evidence that the person apparently entitled in equity is not really so: as in *Cripps* v. *Jee*, 4 Br. C. C. 472. where the owner of an incumbered estate mortgaged the equity of redemption to two persons, of the name of *Rogers*, for a consideration stated in the deed, the real intention being that they should be mere trustees to sell the estate, and after paying off the incumbrances to pay the surplus to the grantor. In the book of accounts of one of the *Rogers's* there was an entry in his handwriting of a year's interest paid to an incumbrancer on account of the grantor, and other entries of the repayment of that interest to *Rogers* by the grantor; and there was also evidence of a note and bond given by the grantees to a creditor of the grantee, in which they stated themselves to be trustees of the estate for the grantor. Lord *Kenyon* held that, as it was clear from the written evidence that the agreement really made between the parties was not that stated in the deed, parol evidence was admissible. See *Leman* v. *Whitley*, 4 Russ. 423.]

Implied and resulting trusts.

[By the eighth section, trusts upon a conveyance which arise or result by the implication or construction of law, or are transferred or extinguished by any act or operation of law, are excepted from the operation of the act. One of the most obvious instances of a resulting trust is where one man takes a conveyance of the legal estate, and another pays the money. The clear result of all the cases without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or *successive*, results to the man who advances the purchase-money. This is a general proposition supported by all the cases; and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence. Per *Eyre*, C. B. *Dyer* v. *Dyer*, 2 Cox, 93: Watk. Cop. 216. See *Anon.* 2 Vent. 361; 2 Vern. 67; 2 Atk. 150, 257: *Lewis* v. *Lane*, 2 Myl. & K. 449. As to a joint advance and a conveyance to one only, see *Wray*

Purchase in name of a third person.

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Trusts by implication.

Purchase in the name of another.

v. *Steele*, 2 Ves. & B. 388, overruling a dictum of Lord *Hardwicke*, in *Crop* v. *Norton*, Barnard. 185: 2 Atk. 74; 9 Mod. 233; as to which see also *Palmer* v. *Young*, 1 Vern. 276. If a person is employed by another to purchase an estate, and pays all the money himself, there is no constructive trust within the eighth section, *Bartlett* v. *Pickersgill*, 1 Cox, 15; 1 Eden, 515. See *Rastel* v. *Hutchinson*, 1 Dick. 44: *O'Hara* v. *O'Neill*, 2 Br. P. C. 39. In the latter case an agent was employed to procure a beneficial lease, which he took in his own name, paying the money himself, but the principal surrendered a short lease which he had in possession as part of the consideration, and the Court declared that there appeared a trust sufficiently proved by letters of the defendant's handwriting and subscribed by him, besides the *implied trust* which might arise or result to the plaintiff from the surrender of his lease for three years. But where a trustee purchases an estate with trust money, and takes the conveyance in his own name, and it appears on the face of the deed, or by writing under the trustee's hand, or even by mere parol evidence, or implication, provided it is unquestionable, a trust will result in favour of the owners of the money. *Deg* v. *Deg*, 2 P. Wms.: *Lane* v. *Dighton*, Amb. 409: *Sowden* v. *Sowden*, 1 Br. Ch. C. 582: *Parry* v. *Philips*, 4 Ves. 108: *Wilson* v. *Foreman*, 2 Dick. 593. See 2 Fonbl. Eq. 119, n., 4th ed.: and *infra*, p. 337.]

[Where money is actually paid, then the trust arises from the payment of the money, and not from any agreement of the parties. And where a lease is granted at rack-rent to A., upon an understanding that B. is to have a joint interest with A., and no fine is paid, the subsequent payment of a moiety of the rent by B. does not raise a trust in his favour by implication. *Riddle* v. *Emerson*, 1 Vern. 108. But if A. takes a renewal in the name of B., and pays the fine, a trust results to A. *Maddison* v. *Andrew*, 1 Ves. sen. 60. It is contended by Mr. *Sanders*, (Uses and Trusts, Vol. 1, p. 322, 4th ed.), that in order to raise a trust of this kind, the fact of the ownership of the money should appear upon the face of the deed, either by a recital or by expressions which amount to a necessary implication or presumptive proof of it, or else that it should be admitted by the nominal purchaser by some writing sufficient to raise a trust within the seventh section; and he cites *Kirk* v. *Webb*, Pr. Ch. 84: *Newton* v. *Preston*, Id. 103: *Denton* v. *Davis*, 18 Ves. 499, of which authorities the two former seem to bear out his proposition, though the latter certainly does not; but it is conclusively established by numerous authorities that parol evidence is admissible for the purpose of raising a constructive trust; (see

Payment of money may be proved by parol.

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Purchase with another's money.

Weall v. *Rice*, 2 Russ. & M. 251), and this, whether the money is expressly stated in the conveyance to have been paid by the nominal purchaser or not. Thus, in *Willis* v. *Willis*, 2 Atk. 71, Amb. 413, Lord *Hardwicke* said that he who paid the money must clearly prove the payment; but there is another way of taking a case out of the statute, and that is, by admitting parol evidence within the rules laid down in this Court, to shew the trust from the mean circumstances in the pretended owner, which makes it impossible for him to be the purchaser. So, in *Lench* v. *Lench*, 10 Ves. 517, Sir *W. Grant*, M. R., said, "All depends upon proof of the fact, for whatever doubts may have been formerly entertained upon this subject (*a*), it is now settled that money may in this manner be followed into the land in which it is invested, and a claim of this sort may be supported by parol evidence. In *Lane* v. *Dighton*, Amb. 409, though Sir *Thomas Clarke* declared that if it was *res integra*, he should have thought parol evidence ought not to be admitted, yet he conceived himself bound, upon the determination of Lord *Hardwicke*, to receive and act upon such evidence." Again, in *Wray* v. *Steele*, 2 Ves. & B. 388, Sir *T. Plumer*, V. C., directed an inquiry after the death of the nominal purchaser, it being stated that a part of the money had been advanced by another person, and an account in the handwriting of the nominal purchaser been produced. In *Ex parte Vernon*, 2 P. Wms. 549, the receipt for the purchase-money had been given to the trustee, who was dead, and upon parol evidence that it belonged to the petitioner (under the 7 Anne, c. 19), and that the deceased trustee had acknowledged the trust, Lord *King*, C., ordered the infant heir to convey, observing that the estate would not bear the expense of a decree; but in future, where there was no declaration of trust in writing, he should leave the *cestui que trust* to bring his bill, because these orders for an infant trustee to convey ought to be in the plainest cases, and not in such as are subject to the disputes which trusts without writing may be liable to. See also *Richards* v. *Syms*, Barnard. 93: *Ryall* v. *Ryall*, 1 Atk. 59, Amb. 413: *Lane* v. *Dighton*, Amb. 409: *Knight* v. *Pechey*, 1 Dick. 327: *Bartlett* v. *Pickersgill*, 1 Cox, 15, 1 Ed. 516; and see *Sir J. Peachy's case*, 3 Sugd. Vend. 258.]

[But very clear evidence is requisite to establish a trust of this kind. Evidence of declarations by the deceased trustee, where there are no corroborating circumstances by any writing under his

(*a*) [See *Kirk* v. *Webb*, Pr. Ch. 84: *Newton* v. *Preston*, Id. 103: *Kendar* v. *Milward*, 2 Vern. 440: *Kinder* v. *Miller*, Pr. Ch. 172, *S. C.* As to the first cited case, see *Halcott* v. *Markant*, Pr. Ch. 168, and *infra*, p. 338.]

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Implied trusts.

hand, is in all cases most unsatisfactory, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the mistake or failure of recollection may totally alter the effect of the declaration. In most of the cases there has been at least something in writing; some account by which it appeared that the fund was laid out. Per Sir *W. Grant*, 10 Ves. 517. See *Gascoigne* v. *Thwing*, 1 Vern. 366 : *Cooth* v. *Jackson*, 6 Ves. 39 : *Groves* v. *Groves*, 3 You. & J. 163, 170.]

Paying off mortgage.

[Upon a mortgage, where the debt appears to be satisfied, there arises a trust by operation of law for the benefit of the mortgagee, which is within the exception in the statute; and in these cases also the Court receives any *kind* of evidence of payment. And therefore if a mortgage was made by one partner to another, and the mortgagee agreed with the other that he should take a certain part of the profits of the partnership in discharge of the mortgage, that of itself would discharge it. So, if a bond to secure a mortgage debt is delivered up, that will discharge the mortgage. Per Lord *Hardwicke*, *Richards* v. *Syms*, Barnard. 93.]

Resulting trust upon a partial declaration of trust.

[A trust also arises by implication, where, upon a conveyance or devise, a trust is declared only as to part, which is an implied exclusion of the grantee from any further benefit, and then what remains results to the grantor or his representatives. *Lane* v. *Dighton*, Ambl. 411 ; 2 Atk. 150 : Barn. 388: *Hill* v. *Bishop of London*, 1 Atk. 618 : *Cottington* v. *Fletcher*, 2 Atk. 156 : *Davidson* v. *Foley*, 2 Br. Ch. Ca. 203 : *Langham* v. *Nenny*, 3 Ves. 467 : see *Cook* v. *Hutchinson*, 1 Keen, 42.]

No resulting trust upon a conveyance without consideration.

[The analogy between resulting uses and trusts, is not quite so strict as might be inferred from the remarks of *Eyre*, C. B., in *Dyer* v. *Dyer*, (*ante*, p. 333), for although upon a conveyance at common law, without any consideration expressed, or use declared, a use will result to the grantor, a trust will not result upon a conveyance or lease made without consideration, or, which is the same thing, upon a nominal consideration. *Lloyd* v. *Spillet*, 2 Atk. 150; Barnard. 387 : *Young* v. *Peachy*, 2 Atk. 256 : *Lady Bellasis* v. *Compton*, 2 Vern. 294 : *Pilkington* v. *Bayley*, 7 Br. P. C. 526 : *Leman* v. *Whitley*, 4 Russ. 423 (*a*). And where a valuable consi-

(*a*) [In the case of *The Duke of Norfolk* v. *Browne*, Eq. Ab. 381, pl. 4, Pr. Ch. 80, the plaintiff's father had executed a grant of the next avoidance of a church to the defendant's father, who was a clergyman, and a person much intrusted by him; and the grantee knew nothing of the grant, and being examined in a cause, deposed that he did not purchase it of the Duke; and it was held to be a resulting trust for the grantor, there being no other trust de-

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deration is expressed, and the evidence shews that it was not paid, nor meant to be paid, equity will not raise a constructive trust of the land in favor of the grantor, but only gives him a lien upon it for the money. *Leman* v. *Whitley*. It follows that, unless there is fraud or mistake, parol evidence is not admissible to raise a trust in cases of this kind. In *Birch* v. *Blagrave*, Ambl. 265, a trust was held to result upon a conveyance by a father to his daughter, expressed to be in consideration of natural love and affection. See some remarks on this case, *infra*, p, 347.]

Trusts implied against volunteers, purchasers, &c., with notice.

[Another class of cases referred by some writers to the head of trusts arising by implication of law, is where the trust already exists in respect of the subject matter to which it relates; but by the transfer of the subject to another person, without any declaration of trust, the trust is raised by implication against such person. See 1 Sand. Uses, 319, 4th ed. Such are the cases of a devolution of the property from the trustee by act of law upon his real or personal representative, assignees in bankruptcy, &c; a forfeiture; a transfer by the trustee to a volunteer, with or without notice of the trust; a sale, lease, or other alienation which amounts to a breach of trust, to a purchaser for value, *with* notice, as to which, *vide infra*, Vol. 5, p. 449. As the fact of notice or want of consideration may always be made out by parol, these are properly instances of trusts which may arise by implication, without writing. But it is unnecessary to take any particular note of trusts of this kind, because it is clear that they are not included in the 8th section, inasmuch as the 7th section, to which the 8th is appended, contemplates exclusively the declaration or creation of trusts in respect only of the property upon which they attach in the first instance, and not in respect of the persons against whom they may become successively enforceable. Indeed it may be doubted whether resulting trusts are at all within the words or spirit of the 7th section, and whether, therefore, the exception of them by the 8th was not superfluous.]

Implied trust, when the trust property is converted.

[Another class of constructive trusts is, where the original estate or property which was subject to the trust is either destroyed or so disposed of as not to be available for the benefit of the *cestui que trust*, and some equivalent is obtained by the trustee, which is not, like money, destitute of "ear-mark," and may be followed and appropriated by a court of equity to the use of the *cestui que trust*. Thus, if a trustee purchase land or stock with trust money, the land

clared. But this was a mere inaccuracy of expression, the real foundation of the decree being the admission by the trustee that he was not the owner, and not any implication of law from the circumstances.]

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or stock will be impressed with the trust, as in the analogous cases already discussed, where the conveyance is made to one person and the money advanced by another. But where the trust does not authorise the purchase of land, it seems that the *cestui que trust* are not entitled to it in specie, but only to a lien against it. *Lane* v. *Dighton*, Ambl. 409 : *Balgney* v. *Hamilton*, cit. Ib.: *Ryall* v. *Ryall*, 1 Atk. 59; Ambl. 413 : *Harrison* v. *Harrison*, 2 Atk. 121 : *Lord Chadworth* v. *Edwards*, 8 Ves. 46: *Lench* v. *Lench*, 10 Ves. 517: *Lewis* v. *Madocks*, 17 Ves. 48: *Liebman* v. *Harcourt*, 2 Mer. 513. See *Wale* v. *Whorwood*, 2 Atk. 159: *Worsley* v. *Earl of Scarborough*, 3 Atk. 392: *Savage* v. *Carrol*, 1 Ball. & B. 265.

Parol evidence of conversion.

The trust which arises in cases of this kind is properly a resulting trust within the exception in the statute; and it was decided in the above cases that the nature of the transaction, and the fact of the appropriation of the money, might be made out by parol evidence.

Money may be followed into land.

Some early cases to the contrary are overruled by the modern authorities. It is not clear from the report, that *Kirk* v. *Webb*, Pr. Ch. 84, which is usually cited as a decision against the admission of parol evidence, was not determined upon the insufficieney of the particular evidence that was offered. See Pr. Ch. 169, 172: Sel. Ch. Cas. 57. In *Heron* v. *Heron*, Pr. Ch. 163, there was a regular account, under the trustee's own hand, of the application of the trust monies, and it was held that the lands purchased should not be a trust for the parties entitled to the money. But there the personal estate of the deceased trustee was sufficient to replace the fund; and it does not appear that there was any case for marshalling the assets. In *Halcott* v. *Markant*, Pr. Ch. 168; 2 Eq. Ab. 744, 2 P. Wms. 414, the bill was dismissed upon what would now probably be considered sufficient evidence of the application of the money; but it does not appear that any general principle was laid down. In *Kinder* v. *Miller*, or *Kendar* v. *Milward*, Pr. Ch. 172; 2 Vern. 440; 2 Eq. Ab. 744, a decree at the Rolls, declaring real estate liable in satisfaction for money with which it had been purchased, was reversed by Lord Keeper *Wright*, on the authority of *Kirk* v. *Webb*, but no reasons are given. There is also a dictum of Lord *King*, in *Deg* v. *Deg*, 2 P. Wms. 414, that money cannot be followed into land, unless there is a declaration in writing by the trustee, amounting to a declaration of trust. But the doctrine stated above is well settled.

Distinction where there is no trust for investment in land.

If it is not part of the trustee's duty to purchase land, the application of the money must be distinctly proved. See *Denton* v. *Davies*, 18 Ves. 499, and cases cited *supra*. But where the money is affected by a trust for investment in land, and no other account can

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be given of it, the presumption that the land was purchased with it will easily arise. *Sowden* v. *Sowden*, 1 Br. C. C. 582: *Lechmere* v. *Lechmere*, For. 80. In *Perry* v. *Philips*, 4 Ves. 108; 17 Ves. 173, land purchased with monies to which the trustee conceived himself entitled, but which he should have invested in land, was held not to be subject to the trust. See *Savage* v. *Carroll*, 1 Ball. & B. 265. As to the effect of covenants to purchase and settle lands, *vide infra*, Vol. 9, p. 106 *et seq.*, 1st ed.]

Renewals, &c., by trustees, &c.

[Renewals of leases, purchases of the reversion or equity of redemption, &c., by trustees, guardians, or persons regarded by Courts of equity as standing for this purpose in a fiduciary situation, are also said to involve a constructive trust for the benefit of those who were interested in the lease which was surrendered. See *Holt* v. *Holt*, 1 Ch. Ca. 191: *Rushworth's case*, Freem. 13: *James* v. *Dean*, 11 Ves. 383; 15 Ves. 236: *Wenslow* v. *Tighe*, 2 Ball. & B. 195: *Randall* v. *Russell*, 3 Mer. 197: *Giddings* v. *Giddings*, 3 Russ. 241: *Acherley* v. *Acherley*, 2 Br. P. C. 67: *Fosbrooke* v. *Bulguy*, 1 Myl. & K. 226: *Nesbit* v. *Tredennick*, 1 Ball. & B. 47; and *infra*, Vol. 4, p. 395. But, as the more accurate way of viewing these cases is to regard the contingent benefit of renewal as being itself *ab initio* subject to the trust, it seems that they do not fall within the scope of the present inquiry; and of this opinion was Lord *Hardwicke*, who, observing in *Lloyd* v. *Spillett*, 2 Atk. 150, that, since the Statute of Frauds, the lines are exactly drawn with regard to resulting trusts, said—"I am now bound down by the Statute of Frauds to construe nothing a resulting trust but what are there called trusts by operation of law. And what are those? Why, *first*, where an estate is purchased in the name of one person, but the money or consideration is given by another; or, *secondly*, where a trust is declared only as to part, and nothing said as to the rest; what remains undisposed of results to the heir at law, and they cannot be said to be trustees for the residue. I do not know in any other instances besides these two where this Court has declared resulting trusts by operation of law, unless in cases of fraud, and where the transactions have been carried on *malâ fide*." Upon this Mr. *Fonblanque* remarks, (Treat. on Equity, 117, n., 4th ed.), that "this construction of the clause of the Statute of Frauds restrains it to such trusts as arise by operation of law, whereas it clearly extends to such as are raised by construction of Courts of equity; as in the case of an executor or guardian renewing a lease, though with his own money, such renewal shallbe deemed to be in trust for the person beneficially interested in the old lease. *Holt* v.

What are resulting trusts within the Statute of Frauds.

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Holt, 1 Ch. Ca. 191: *Whalley* v. *Whalley*, 1 Vern. 484; Sand. Uses, 240. It is also observable, that the first instance stated by his Lordship of a resulting trust is not so qualified as to let in the exceptions to which the general rule is subject; and the second instance is only applicable to a will, whereas the doctrine of resulting trusts is equally applicable to conveyances. But in the case of a conveyance, it is by no means universally true, that what is not conveyed will result; as where the grantor limits an estate for years to himself, and an estate to another, by way of use, upon a contingency which may not happen within the term of years, an estate of freehold will not result to the grantor." When the nature of the interest which the *cestui que trust* has in the benefit of renewal of a lease is considered, it will perhaps be thought, that cases of renewals were properly omitted by Lord *Hardwicke* in his enumeration of resulting trusts. The instance put by Mr. *Fonblanque*, of a partial declaration of a use, falls under the general rule, that a use or trust shall not be implied to result against the apparent intention of the parties.]

Equity of redemption is an implied trust.

[An equity of redemption is a trust raised by implication from the nature of the transaction, and comes within the exception in the 8th section. And the nature of the transaction may, for the purpose of raising a trust of this kind, be explained by parol evidence; (*infra*, Vol. 5, p. 81). It is to be observed that, in all the cases, the evidence was admitted on the ground of fraud. The trust, however, is clearly in its origin out of the operation of the 7th section, and therefore comes within the rule that allows parol evidence to be used in order to rebut implied trusts. Thus, in *Bonham* v. *Newcombe*, 2 Ch. Cas. 58, (*infra*, Vol. 5, p. 83), it was inferred, from the relationship of the parties, that a transaction which, under other circumstances, would have been treated in equity as an ordinary mortgage, was intended for a settlement; and the Court refused to allow of a redemption after the period limited by the deed. But, in general, equity is so far from admitting of presumptions against the right of redeeming, that it will not allow any effect to the most stringent covenants, by which it may be attempted to fetter tha right. (*Infra*, Vol. 5, p. 80).]

Equity of redemption revived by parol.

[In accordance with this view of the nature of an equity of redemption, it may be noticed, that equity gave effect to parol recognitions by a mortgagee of the mortgagor's right to redeem, so as to keep the right alive beyond the period limited by the ordinary rule of the Court. The doctrine is now superseded by the express enactment of the recent Statute of Limitations, (*vide infra*, Vol. 5,

p. 385, where the cases on the subject are enumerated), but the decisions are still worthy of notice, as illustrating the construction that Courts of equity have put upon the statute. It will be sufficient to cite a passage from the judgment of the Court in the case of *Reeks* v. *Postlethwaite*, G. Coop. 166; and another from the case of *Hodle* v. *Healey*, 1 Ves. & B. 536; 6 Madd. 181. In the former case, Sir *T. Plumer*, V. C., said—"The right to redeem arises upon the original contract between the parties, being by the very terms, and upon the face of the conveyance itself. It is true, that where the time specified is elapsed, that right is gone at law, but not in equity. That gets rid entirely of the objection upon the Statute of Frauds, for the contract was in writing, and the right of redemption was reserved by that contract. To consider then, next, the rule as to twenty years barring the right of redemption, the first question is, is it an absolute rule? No—it is a qualified rule, and depending altogether upon circumstances. Numberless cases might be cited as to that; first, where there have been disabilities of the party, as infancy, coverture, beyond sea. Now, writing is not necessary to prove these disabilities, and it would often be impossible to procure it; parol evidence of them is always receivable. Next, are disabilities the only cases in which the rule is departed from? No—receiving interest, keeping accounts, treating it in any will or deed as a mortgage will do. Such acts, and others of the sort, then, are also sufficient to take the case out of the rule, and which may be solemn and deliberate acts or not, according as the party is attending or not attending to what he is doing. I admit, that to acknowledge it was originally a mortgage is nothing at all; that is *ex concessis;* and conversation therefore, admitting that fact, cannot carry it further than the original deed between the parties carries it. There must be evidence that it is a subsisting mortgage. Now, with respect to every one of the acts in all the cases in which a redemption has been decreed, after twenty years, I would ask how are they to be proved? By the law of evidence must be the answer. By writing only? I ask where is the law which says that? What precise act, then, will be sufficient? The answer must be, *any* precise act. So, with respect to the Statute of Limitations, I may shew, after twenty years, an actual entry by me, or an acknowledgment from the party of his being my tenant. So, with a mortgage, the acts need not be done with the other party; his own acts, the mere *ex parte* acts of the mortgagee, will be sufficient. Cases of part performance constitute another class of cases in which parol evidence is received respecting interests in land: so, cases of trust."]

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Equity of redemption revived by parol. *Reeks* v. *Postlethwaite.*

[In *Hodle* v. *Healey*, the question was, as to the effect of parol

Hodle v. *Healey.*

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Parol evidence to revive equity of redemption.

acknowledgments of title in keeping an equity of redemption on foot, and Sir *J. Leach*, V. C., said—"I fully admit the doctrine in the cases cited, that an acknowledgment is not to be inferred from equivocal expressions; but it may be observed, that the force of the expressions used may in some degree depend upon the time when they are used. In all the cases referred to, the twenty years had actually passed before the expressions were used, and the question was, whether their effect was to revive a right then lost to the mortgagor? The question is very different where the inquiry is, whether what passes is not an admission of a right which at the time was clearly vested in the mortgagor?" There does not, however, appear to be any distinction between the two cases, so far as the Statute of Frauds is concerned. The period of twenty years was adopted by Courts of equity in analogy with the Statute of Limitations, beyond which it would not allow the trust which was its own creation to be enforced; but the *destruction* of an estate or right by mere lapse of time, (independently of any presumption), was, previously to the recent Statute of Limitations, (*ante*, p. 50), unknown to our law; and therefore, although the mortgagor might have lost his *remedy* at the end of twenty years, a Court of equity might, without incongruity, consider his dormant interest in the estate as still subsisting, so as to be enforceable, if, in the conduct of the mortgagee, it should see reason for enforcing it. By so doing, equity raised no new trust, and therefore did not infringe upon the statute.]

Implied trusts may be rebutted by parol evidence.

Express trusts cannot be rebutted by parol.

[It has been seen, that circumstances upon which an implication of trust would arise, may be established by parol evidence; and it is equally well settled, that other circumstances tending to contradict such implication, may also be supplied by evidence of the same kind: in other words, that implied trusts may be rebutted by parol; and implied trusts only. For, if the trust which would have been implied without any declaration, is expressly or constructively declared upon the instrument itself, parol evidence to rebut the trust could not be admitted without contradicting the instrument. Thus, if before the stat. 11 Geo. 4 & 1 Will. 4, c. 40, a specific bequest was made to an executor, parol evidence was admissible and allowed to rebut the presumption that the testator meant the executor to take the residue in trust for the next of kin; but, if the legacy was given to the executor "for his care and pains," that was evidence on the face of the will of an intention that he should take the office as an office of burthen, and not as residuary legatee, and could not be contradicted by parol. *Rochfield* v. *Careless*, 2 P. Wms. 161: *Mallabar* v. *Mallabar*, Cas. temp. Talb. 78: *White* v. *Evans*, 4 Ves. 21: *Langham* v. *Sandford*, 17 Ves. 435: 19 Id. 640: *Gleppin* v.

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Yapp, 5 Mad. 56. See *North* v. *Crompton*, 1 Cas. in Eq. 196; 2 Vern. 253; 14 Ves. 323, cit. *contra*.]

What evidence sufficient to rebut an implication of a trust.

[In *Maddison* v. *Andrew*, 1 Ves. sen. 60, the evidence of a single witness, being unimpeached, was allowed to rebut the trust implied from the payment of the fine for renewing a lease. See further as to rebutting a resulting trust, *Goodright* d. *Langfield* v. *Hodges*, Lofft, 230; Watk. 227: *Kidder* v. *Kidder*, 10 Ves. 360: *King* v. *Denison*, 1 Ves. & B. 260: *Cook* v. *Hutchinson*, 1 Keen, 42. A resulting trust may be rebutted as to part of the land comprised in a deed, and prevail as to the remainder; and so it may be rebutted as to part of the interest in land. Per Sir *J. Leach*, M. R., *Benbow* v. *Townsend*, 1 Myl. & K. 510. See *Maddison* v. *Andrew*, 1 Ves. sen. 60.]

Resulting trust may be rebutted in part.

Purchase in the name of a child or wife.

[Of the circumstances that are sufficient to rebut the presumption upon which a trust results to him who advances the purchase-money, a well-known instance is where the money is paid by the parent of the nominee, or by one who stands in the place of a parent to him (*a*), as a grandfather, the father being dead (*b*), and the child is insufficiently provided for at the time. In such case the trust does not result; and it is immaterial that the child is illegitimate, or that the estate is reversionary, or, where it is in possession, that the father has the possession, receives the rents and profits, makes repairs and improvements, leases at rack-rent, &c. (*c*). *Grey*

(*a*) [In the *Lex Prætoria*, 272, it is said, that the presumption is less strong in favour of a daughter, because daughters are not usually provided for by settlement of land. It has, however, been decided in favour both of a wife and of a daughter, against creditors and purchasers. *Jennings* v. *Sellick*, 1 Vern. 467; *Back* v. *Andrew*, 2 Vern. 120; See *Lady George's case*, cit. Cro. Car. 550.]

(*b*) [The fact that the purchaser stands in *loco parentis* to the nominee must of course be established by parol. And the fact that he has behaved as if he considered himself to stand in that situation, would, it is conceived, if proved, be sufficient to rebut the resulting trust, although the father of the nominee were living. *Powys* v. *Lord Mansfield*, 3 Myl. & Cr. 359.]

(*c*) [The son, in good manners, does not contradict his father's perception of profits, &c., which, indeed, during infancy is a kind of guardianship. 2 Swanst. 599, 600; 2 Atk. 480. But as to the father's exercising these acts of ownership after the son's majority, see *Loyd* v. *Read*, 1 P. Wms. 607, and *Att.-Gen.* v. *Bagg*, Hard. 125; but in the latter case it was considered fraudulent against the crown, the father being an accountant; and, in the former, the dictum was of a purchase during the infancy of the child, and a continuance of receipt of profits after his majority, which would be matter *ex post facto*, and clearly insufficient to raise a trust, *vide infra*, p. 346. A dictum in *Murless* v. *Franklin*, 1 Swanst. 17, that the father's possession is evidence of a trust for himself, is quite irreconcilable with the authorities; unless it be meant of a purchase when the son has attained his majority, which, according to Lord C. B. *Gilbert*, (*Lex Prætoria*, 271), is

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v. *Grey*, 1 Ch. Cas. 296; Cas. tem. Finch, 338; 2 Freem. 6; 2 Swanst. 594, S. C.; *Shales* v. *Shales*, 1 Eq. Ab. 382, pl. 9; 2 Freem. 252: *Mumma* v. *Mumma*, 2 Vern. 190, 1 Eq. Ab. 382, pl. 8: *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111: *Taylor* v. *Taylor*, 1 Atk. 386; 3 Br. C. C. 229: *Elliot* v. *Elliot*, 2 Ch. Cas. 231: *Ebrand* v. *Dancer*, 2 Ch. Cas. 26: (see 1 P. Wms. 608); *Beckford* v. *Beckford*, Lofft, 490: *Finch* v. *Finch*, 15 Ves. 43; 2 Fonbl. Eq. 123, n., 4th ed.; 1 Myl. & K. 517. If the purchase-money is not paid during the father's lifetime, his personal representative must pay it, and the son still keeps the estate. *Redington* v. *Redington*, 3 Ridgw. P. C. 106. In applying the assets the son would probably be considered to stand in the situation of a devisee, so that the lien for the purchase-money would be enforceable against him for the benefit of the creditors, but not of the legatees, in analogy with the distinction established by the cases of *Selby* v. *Selby*, 4 Russ. 336, and *Wythe* v. *Henniker*, 2 Myl. & K. 635. Where the money is paid in the father's lifetime, the son's claim is good against purchasers and creditors. *Anon.* 2 Freem. 123: *Lady George's case*, Cro. Car. 550: *Jennings* v. *Sellick*, 1 Vern. 467: *Back* v. *Andrews*, 2 Vern. 120: 2 Cox, 97. But where the father was an accountant to the Crown, and had kept possession during his life and after his son had come of age, it was considered, upon a *diem clausit extremum*, to be fraudulent against the Crown. *Att.-Gen.* v. *Bagg*, Hard. 125. See *Birch* v. *Blagrave*, Ambl. 264. By the 6 Geo. 4, c. 16, s. 73, a voluntary advancement of this kind is void against the father's assignees in bankruptcy if he was insolvent when he made it.]

Contract enforceable against the father's personal representatives.

Child's title against purchasers and creditors.

Fraud.

Purchase by husband in wife's name.

[The presumption of a resulting trust is equally rebutted in the case of a purchase by a husband in the name of his wife, or in the joint names of himself, his wife, and a child or children. *Kingdon* v. *Bridges*, 2 Vern. 67: *Back* v. *Andrew*, Ib. 120. See *Dyer* v. *Dyer*, Watk. Cop. 216; 2 Cox, 94. A purchase in the joint names of a child and a stranger gives the entire beneficial ownership to the latter. *Lamplugh* v. *Lamplugh*, 1 P. Wms. 112: *Crabb* v. *Crabb*, 1 Myl. & K. 518. And a purchase in the joint names of the father and son is for the benefit of the son, if he survive. *Scroope* v. *Scroope*, 1 Ch. Cas. 27; 2 Freem. 171; 2 Swanst. 599: *Back* v.

Joint purchases.

no advancement, if the father takes possession; and see *Woodman* v. *Morrel*, 2 Freem. 32. *Sed quære.*—In the case of *Sir George Binion* v. *Stone*, 2 Freem. 169; Nels. 68, a trust seems to have been presumed for the father on account of the extreme *infancy* of the son,—a strange reason, considering the inconvenience attending infancy in a trustee. See *Lamplugh* v. *Lamplugh*, 1 P. Wms. 112; *King* v. *Denison*, 1 Ves. & B. 278.]

Andrew, 2 Vern. 120: *Stileman* v. *Ashdown*, 2 Atk. 477; 1 Myl. & K. 518. And the son shall have the benefit of a moiety against a purchaser; *Lady Gorge's case*, cit. Cro. Car. 550: *Back* v. *Andrew*, 2 Vern. 120; where a copyhold was surrendered to the use of the purchaser and his wife and daughter and their heirs; and it was held that a subsequent conditional surrender by the husband by way of mortgage was void as to the whole; for the husband and wife took one moiety by entireties, so that the husband could not dispose of it to bind his wife; and the other moiety was well vested in the daughter. See Co. Litt. 187. But, in *Stileman* v. *Ashdown*, 2 Atk. 477, Lord *Hardwicke*, said, that the presumption in favour of the son was not so strong in the case of a joint purchase as in others; (see, too, *Pole* v. *Pole*, 1 Ves. sen. 76); and held that the surviving son could not claim any part against a judgment creditor. But he laid some stress on the fact, that all the assets had been exhausted in the purchase. (See *Christ's Hospital* v. *Budgin*, 2 Vern. 683; *Kingdon* v. *Bridges*, Ib. 67; 2 Cox, 97; but, as to the former case, see *Fletcher* v. *Sedley*, 2 Vern. 490; 1 Ves. sen. 130; 8 Ves. jun. 199; and see *Campion* v. *Cotton*, 17 Ves. 603). Of course, if the son's claim in *Stileman* v. *Ashdown*, had succeeded at all, it would have succeeded as to the entirety.]

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Joint purchasers.

[Where it was the custom of a manor to grant copyholds for lives in succession, and that the first taker might surrender the whole lease, it was once held, that where a father took the grant to himself, his son, and daughter *successivè*, the trust resulted to the father; *Dickinson* v. *Shaw*, 2 Cox, 95, cit. But the contrary has since been decided, and that the custom that the first nominee may surrender the whole lease is immaterial. *Dyer* v. *Dyer*, 2 Cox, 92, 96: Watk. Cop. 216: *Murless* v. *Franklin*, 1 Swanst. 13: see *Swift* d. *Farr* v. *Davis*, 8 East, 354, n.: *Finch* v. *Finch*, 15 Ves. 50: *Lewis* v. *Lane*, 2 Myl. & K. 454: *Edwards* v. *Edwards*, 2 You. & C. 123.]

Purchase of copyholds for lives *successivè*.

[The rule in favour of children which has just been considered, is founded merely on the presumption of intention gathered from the relationship of the parties, and may be rebutted by evidence of a different intention, either direct, or implied from circumstances; of which latter kind of evidence we have already seen some instances. "It has been determined in so many cases that the nominee being a child, shall have such operation as a *circumstance of evidence*, that we should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so *as a circumstance of evidence*. I think it would have been a

Implication in favour of child may be rebutted by evidence.

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Resulting trusts.

more simple doctrine, if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law: surely then it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood (*a*). Considering it as a circumstance of evidence, there must be of course evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides." Per *Eyre*, C. B., *Dyer* v. *Dyer*, 2 Cox, 93; Watk. Cop. 218: see *Taylor* v. *Alston*, cit. 2 Cox, 97.]

What evidence sufficient to raise a trust for the father.

[Upon the question of what evidence will be sufficient to shew that an advancement was not intended, it may be observed, in the first place, that the circumstances relied on must be contemporaneous: no subsequent declaration, conveyance, devise, or other act, by the parent will do. 2 Freem. 6, 34; Ambl. 266: *Elliot* v. *Elliot*, 2 Ch. Cas. 231: *Mumma* v. *Mumma*, 2 Vern. 19: *Sidmouth* v. *Sidmouth*, 2 Beav. 447. Thus, in *Finch* v. *Finch*, 15 Ves., the son having brought an ejectment against his father, the latter applied for an injunction, which was refused. So, if the father makes a will, devising away the estate, if he has made no declaration at the time of the purchase, the will cannot be looked to as evidence of what he meant by the purchase, still less as controlling what he did in fact intend to do at that time. Ib.; *Crabb* v. *Crabb*, 1 Myl. & K. 511. So, where the father *subsequently* obtained a license to demise the estate, being copyhold. *Murless* v. *Franklin*, 1 Swanst. 13. If the license had been taken at the same time, it would have been otherwise; *Swift* d. *Farr* v. *Davis*, 8 East, 354, n.; and where the father had a copyhold estate in possession for his life, with remainder to his two daughters in succession, and the custom was, that the grantee in possession might by surrender pass his own estate and those in remainder, and he procured a grant to his son in remainder, and *at the same Court* surrendered all his estate and interest during the lives of himself, his daughters, and his son, to the use of his will, it was held, that this shewed he meant it to remain at his own disposal, and that his son should be trustee only. *Prankerd* v. *Prankerd*, 1 Sim. & St. 1.]

Fraud.

[Where the son had been put into possession, and, falling ill, made a declaration of trust in favour of the father, and after his re-

(*a*) [See *Woodman* v. *Morrell*, 2 Freem. 32, and the old cases there cited, where the grounds upon which the trust was held to result to the father, notwithstanding the relationship, are not very intelligible.]

covery continued in possession and married, it was held fraudulent against his wife and creditors. *Bateman* v. *Bateman*, 2 Vern. 436.]

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[If the son is already provided for, the presumption in his favour does not arise, the obligation upon which it is founded being discharged, and the trust results in the same manner as if the son were a stranger. *Elliot* v. *Elliot*, 2 Ch. Ca. 231: *Pole* v. *Pole*, 1 Ves. sen. 76; Ambl. 265; 2 Cox, 94; 2 Swanst. 600. But a reversionary estate is not a provision for this purpose. *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; and a partial provision is not sufficient to raise the trust; 2 Swanst. 600. The father is the only judge as to the quantum of a son's provision, and though he may seem to have been sufficiently advanced before, yet if it appear that the father thought otherwise, it will be inferred that he intended completely to discharge his duty, and no trust will result. *Redington* v. *Redington*, 3 Ridgw. P. C. 106; 2 Cox, 94.]

Purchase in name of child already advanced.

[If it be presumable from circumstances, that some other object than advancement was intended, a trust will arise; but the taking a joint conveyance will not be inferred to be for the purpose of preventing dower (as suggested in 2 Atk. 480). Where the father was seised jointly with two others, it was said, if he had conveyed to his son in fee-simple, it would not (*a*) have been taken to be a trust in the son; but, inasmuch as it was limited to the father for life, and then to the mother for life, with remainder to the son in fee, it *could not* be taken to be a trust in the son. *Baylis* v. *Newton*, 2 Vern. 28. This case has been cited in treating of the subject under consideration, to shew that where a different purpose appears, as, to sever a joint-tenancy, there shall be no advancement. But the case was not one of a *purchase* at all; it was a conveyance in consideration of relationship, upon which it is clear that no trust results (*ante*, p. 336), and which was therefore within the statute, although this seems to have been overlooked, for parol evidence to shew a different intention, was allowed to be read. In *Birch* v. *Blagrave*, Amb. 265, W. P., in consideration of natural love and affection to his daughter, (who was a widow, and had received a portion from him and was jointured), and as a further provision for her, conveyed several large estates to her in fee, but never communicated the matter to her, and continued in possession until his death, and cut timber and sold part of the estates. The evidence was, that he meant to disqualify himself from serving as sheriff, by enabling him, as he thought, to swear he was not of sufficient estate; but

Purchase in child's name made for a particular purpose.

(*a*) [The word *not* does not appear in the report, but, from the reporter's marginal note, it would seem that it should be inserted.]

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afterwards, altering his mind, he paid the fine. Lord *Hardwicke* held, that the trust belonged to the father, and put it on the ground of mistake. If he had taken the oath, that would have been fraudulent. (See *Knight* v. *Pechey*, 1 Dick. 327). His Lordship spoke of the provision already made for the daughter, and appeared to consider that the case belonged to the class under discussion, of resulting trusts; but here there was clearly no trust resulting by operation of law, and therefore the case fell within the Statute of Frauds, unless taken out of it upon the ground of mistake. See *Lloyd* v. *Spillett*, 2 Atk. 150, where the distinction is clearly laid down by Lord *Hardwicke*.]

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5. Parol evidence to explain or control written instruments.

Parol Explanation of written Instruments.]—[The use of parol evidence in aid of the construction of writings is regulated by principles which are quite independent of the Statute of Frauds, having been established long before that statute was passed. Although, as has been already observed, (*ante*, p. 326), the common law for some purposes recognised two kinds of contracts only; that is to say, contracts by specialty and parol contracts, which latter class included all unsealed writings; (see *Rann* v. *Hughes*, 7 T. R. 350, n., *ante*, p. 326; Bac. Ab. *Ev.* (G.);) yet, for the purposes of construction, a distinction was taken between words written and words spoken, upon which was founded the rule, that extrinsic evidence shall not be admitted to vary or correct the purport of a writing. *Davis* v. *Symons*, 1 Cox, 404: *Meres* v. *Ansell*, 1 Wils. 275: *Lawson* v. *Laude*, 1 Dick. 346: *Butcher* v. *Butcher*, 1 N. R. 113: *Clowes* v. *Higginson*, 1 Ves. & B. 526: *Woodbridge* v. *Spooner*, 3 B. & Al. 233: *Adams* v. *Wordley*, 1 Mee. & W. 374: *Saunderson* v. *Piper*, 7 Scott, 408: *Ogilvie* v. *Foljambe*, 3 Mer. 63. There are some apparent exceptions which serve to illustrate the rule, and one real exception, namely, the admission of such evidence in cases of fraud, which shews the policy upon which it proceeds. Another exception, which is more anomalous, and the limits of which are not so well defined, is the admission of parol evidence of intention to explain latent ambiguities.]

Written agreements, &c., not to be varied by parol.

[" It would be inconvenient," says Lord *Coke*, speaking of the rule, that every contract or agreement ought to be discharged by matter of as high a nature as the first deed, " that matters in writing, made by advice, and on consideration, and which finally im-

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port the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matters in writing should be admitted." *Countess of Rutland's case*, 5 Rep. 26. See *Parteriche* v. *Powlett*, 2 Atk. 384. So, in the case of *Goss* v. *Lord Nugent*, 2 Nev. & M. 33, Lord *Denman*, C. J., laid it down, that, by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract. But after the agreement has been reduced into writing, it is competent to the parties at any time before breach of it, by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be left of the written agreement. The latter branch of the proposition just cited assumes that the subject-matter of the agreement is not such as is required by any act of Parliament to be expressed in writing, and will be considered presently. See also *Williams* v. *Jones*, 5 B. & Cr. 108.]

Declarations at auctions.

[Parol evidence of declarations by an auctioneer at a sale, varying or adding to the printed particulars, will not be admitted at law, on behalf either of a plaintiff or defendant; nor in equity, at any rate, on behalf of a plaintiff. Thus, when the conditions of sale of the timber growing in a certain close were silent as to the quantity, evidence offered by the purchaser, in defence to an action for part of the purchase-money, that the auctioneer had warranted the timber to amount to a certain quantity, was rejected: Lord *Ellenborough*, C. J., said, that there was no doubt that the warranty as to the quantity of timber would vary the agreement contained in the written conditions of sale. The only question which could be made was, whether, if by a collateral representation a party were induced to enter into a written agreement different from such representation, he might not have an action on the case for the fraud practised to lay asleep his prudence. It was not necessary, however, to discuss that point. *Powell* v. *Edmunds*, 12 East, 6: see *Jones* v. *Edney*, 3 Camp. 285: *Jenkinson* v. *Pepys*, 6 Ves. 330; 16 Id. 521. So in

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Gunnis v. *Erhart*, 1 H. Bl. 289, where the conditions of sale stated the estate to be free from all incumbrances, and it turned out that there was a charge of £17 per annum upon them; the sellers, as plaintiffs, were nor allowed to give in evidence that the auctioneer had publicly declared at the sale that the estate was so charged. The Court observed, that no proof was offered that the defendant had any particular personal information given of the incumbrance in question. But whether that would make any difference in a court of law may be questioned. See *Lysney* v. *Selby*, Lord Raym. 1120: *Bradshaw* v. *Bennett*, 5 Car. & P. 48: *Flight* v. *Booth*, 1 Scott, 190, 203: *Ogilvie* v. *Foljambe*, 3 Mer. 65; where some positions laid down by Sir *W. Grant*, as to the doctrine of courts of law, seem to be open to observation. In *Bradshaw* v. *Bennett*, the particulars of sale stated that the property was held for three lives, but, before the sale, one of the lives had fallen in; but evidence that the auctioneer had stated that fact was rejected by Lord *Tenterden*, C. J.: he should have altered the particulars before the sale. In the same case the particulars stated that the lease was held under the Clayton estate, and in answer to an objection that the property was not held directly under that estate, evidence was admitted that the plaintiff (the purchaser) had read the lease previously to the sale, as that did not contradict the written agreement. But it is difficult to see what use could have been made of the evidence, without contradicting the particulars. See *Anson* v. *Towgood*, 1 Jac. & W. 637. In *Skelton* v. *Livius*, 2 Cr. & J. 411, where A., the purchaser at an auction, had sold his lot to B. immediately after it was knocked down to him, evidence of declarations by the auctioneer, varying the terms of the particulars, which were heard by B. as well as by A., was not admitted in an action by A. against B. *Vide infra*, p. 358.]

As to particular notice of an incumbrance, &c.

Written agreement that purchaser shall abide by *declarations* made at the sale.

[A written agreement that the purchaser shall "abide by the conditions and declarations made at the sale," does not authorise the vendor as *plaintiff* to use such declarations in evidence against the purchaser. *Higginson* v. *Clowes*, 15 Ves. 516.]

Parol evidence of matters not within the scope of the instrument.

[The existence of a writing does not, however, necessarily exclude parol evidence as to every part of the transaction to which it relates; for, if the writing does not, on the face of it, purport to include the whole transaction, there is no objection, at common law, to the proof by averment of those matters which are not within its scope. In *Davis* v. *Symonds*, 1 Cox, 402, *Eyre*, C. B., speaking of the rule that excludes parol evidence when there is a writing, said—"I take this rule to apply in every case when the question is, *what* is the

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agreement? and this rule applies no further than this precise question; for, as often as the question is, what were the collateral circumstances attending the agreement? so often may such collateral circumstances be proved by parol evidence: there is no law which says such collateral circumstances may not be so proved. If any of these collateral circumstances are reduced into writing, then the same rule applies to them as to the original agreement; but if not, both at law and in equity, such collateral circumstances may be proved by parol. If duress be pleaded, or a false reading of the deed, you avoid the deed at law by parol evidence; but then these facts are collateral to the import of the instrument, they are *dehors* the agreement, they do not go to vary or alter it; yet, admitting the truth of the agreement, they tend to shew that it ought not to affect the party. These are two instances at law, there are many more in equity, on fraud and circumvention, and many other grounds, and you must necessarily admit parol evidence in all such grounds which are clearly collateral to the agreement itself." Thus, although the consideration upon which an agreement is made is an essential part of that agreement, while it is executory, (*ante*, p. 327), yet it is not necessary to be stated in a conveyance by which an agreement is executed, for the conveyance is not in the nature of an agreement so much as it is a performance on one side; and if, therefore, in a deed of conveyance, no consideration is stated, a consideration may yet be proved in order to support the transaction as a bargain and sale, or covenant to stand seised (*a*). *Peacock* v. *Monk*, 1 Ves. sen. 128. "It may be shewn by extrinsic evidence, who is the author of a gift, when that does not appear upon the face of the transaction. Whatever is wanting to shew the consideration, and from whom it moves, may, I apprehend, be supplied by evidence *dehors* the deed, when such evidence does not contradict the deed." Per Sir *W. Grant*, M. R., *Hartopp* v. *Hartopp*, 17 Ves. 192; see 14 Ves. 170. So, if the conveyance is expressed to be made "for divers good considerations," upon which general words it is settled no use arises, a particular consideration, as that of relationship, or money paid, may be proved by averment. *Mildmay's case*, 1 Rep. 175; see *Lacy* v. *Whetston*, Cr. El. 343, *contra*. In *Peacock* v. *Monk*, Lord *Hardwicke* is reported to have said, that when any consideration is mentioned, as of love and affection only,

Parol evidence of consideration.

As to proving a *different* consideration from that stated.

(*a*) [And so the date is not of the substance of a deed, for as the writing and sealing precede the delivery, a false or impossible date does not exclude proof of the actual time of delivery. *Goddard's case*, 2 Rep. 4: *Stone* v. *Bale*, 3 Lev. 348: *Hall* v. *Cazenove*, 4 East. 477. See *Styles* v. *Wardle*, 4 B. & Cr. 908.]

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Parol evidence to shew consideration.

if it is not said also, "*and for other considerations,*" you cannot enter into proof of any other: the reason is, because it would be contrary to the deed; for when the deed says it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. See, also, 2 Dyer, 146 a. The distinction, however, does not seem to have been taken quite so strictly in the older authorities, and the language of Lord *Coke*, in several places, is opposed to it. See 1 Rep. 176. In *Lord Cromwell's case*, 2 Rep. 69, it was resolved, "that when a fine, feoffment or other conveyance imports an express consideration, a man may aver by word another consideration which stands with the consideration expressed; but the parties cannot by parol aver any other use than is contained in the same conveyance; also, no averment shall be *against* the consideration expressed." In *Bedell's case*, 7 Rep. 39, the owner of an estate, by indenture, expressed to be in consideration of affection for his two sons, covenanted to stand seised of the estate, among other uses, to the use of his wife for life; and it was held, that the use to the wife was well supported, admitting that other consideration than what is expressed in the deed could not be averred; yet in this case there is an express consideration, for when he limits it to the use of the wife for the term of her life, that imports a sufficient consideration in itself, and there needs not any averment, for *manifesta probatione non indigent.* "But," it is added, "if the father by deed indented, in consideration of a hundred pounds paid by the son, covenants to stand seised to the use of his son, there no use shall be raised to the son, unless the deed be enrolled by the stat. 27 Hen. 8, c. 10; for it is in the nature of a bargain and sale, and there *expressum facit cessare tacitum.*" See *Clarkson* v. *Hanway*, 2 P. Wms. 204. In *Villers* v. *Beaumont*, Dy. 146, pl. 68; 1 Rep. 176; 4 Rep. 3; Keilw. 208; an indenture of bargain and sale was expressed to be made in consideration of £70, paid by C., and a recovery was suffered thereon; and an averment that the indenture was made, and the recovery had, in consideration of a marriage between R. B. and C. (in order to make it a jointure within the stat. 11 Hen. 7) was allowed, although there was a particular consideration mentioned in the deed. *A fortiori*, it was allowable where there was no certain consideration named. See also *Vernon's case*, 4 Rep. 3 (*a*). If the consideration expressed in

(*a*) [Of course, in order to shew that a transaction was void for illegality, &c., the party impeaching it may prove the want of a consideration in opposition to the express statement in the deed, or may prove a different consideration from that stated. *Doe* d. *Chandler* v. *Ford*, 5 Nev. & M. 209 :

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a conveyance is disproved, it cannot generally be supported as a gift. *Bridgman* v. *Green*, 2 Ves. sen. 626. In *Rex* v. *Scammonden*, 3 T. R. 474, to establish a settlement, it was allowed to be shewn by parol, that before the deed of conveyance of an estate, which recited the consideration for the purchase to be £28, was executed, the vendor refused to execute unless he had £30, which was paid, and the deed executed without alteration. And Lord *Kenyon*, C. J., cited the use of *Filmer* v. *Gott*, 7 Br. P. C. 70, where the considerations mentioned in the deed were £10,000 and natural love and affection, and the Lords Commissioners of the Great Seal directed an issue to try whether natural love and affection formed any part of the consideration, the estates being worth near £30,000. On an appeal to the House of Lords, this was confirmed, and the jury, on the trial of the issue, finding that natural love and affection constituted no part of the consideration, the deed was afterwards set aside by the Lord Chancellor. But *Filmer* v. *Gott* was expressly decided on the ground of fraud, see 6 Ves. 337, n.; and the evidence in *Rex* v. *Scammonden* was not admitted for the purpose of altering the construction of the instrument as between the parties to it, but for the purpose of shewing, as between one of those parties and third persons, what were the real circumstances attending the transaction. See *Rex* v. *Wickham*, 4 Nev. & M. 406, where strangers

Evidence to vary agreements, &c. may be given by third persons.

Rex v. *Olney*, 1 Mau. & S. 387: *Rex* v. *Cheadle*, 3 B. & Ad. 833. But a different consideration from that stated in the deed cannot be alleged, it seems, by the party charged with a fraud, in order to support the transaction, unless the truth of the statement is itself impeached on the other side. See *Clarkson* v. *Hanway*, 2 P. Wms. 203. And as no executory compact is binding unless made for good consideration, or under seal, a statement of a consideration in an instrument not under seal, may be disproved by the party to whom the consideration is falsely stated to have moved. See *Pike* v. *Street*, 1 Mood. & M. 220: *Foster* v. *Jolly*, 1 Cr. M. & R. 703: *Rex* v. *Wrangle*, 4 Nev. & M. 375. The distinction is between evidence of agreement and evidence of a fact. Where the parties have agreed to state the terms of their contract in writing, they are bound to rely on the writing as conclusive evidence of those terms; but where they state a fact in writing, (not expressly agreeing to be bound by such statement) the writing, though evidence *pro tanto* of the fact, does not exclude other evidence: and to contradict it by such evidence is not to vary any term of the agreement, but to shew that it was made under different circumstances from those stated. Thus, a receipt for money is a memorandum of a fact, and may be contradicted; a written release, if it is not stated to be founded on a payment which in fact has not been made, is evidence of an agreement, and cannot be contradicted; though, of course, its binding effect may be questioned. Where a person, by writing, agrees to give up his legal rights, the paper does not exclude evidence that he was ignorant of their true nature, for that is a fact, and not part of the agreement. *M'Carthy* v. *Decaix*, 2 Russ. & M. 614: *Pickering* v. *Pickering*, 2 Beav. 31; affirmed on appeal, 4 Myl. & Cr. 289.]

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to a deed were allowed to shew that land described in it as being in the parish of C., was really situate in A.]

Evidence of collateral circumstances.

[Where the parol evidence shewed that the following letter—"Sir, I hereby agree, upon payment of 10*s.* in the pound of our debt, to give R. a full discharge for the same"—was written for the purpose of being shewn to the other creditors of R. as witnessing the terms upon which the writer was willing to join in a general composition—it was held admissible, as it was not given for the purpose of adding to or qualifying the terms of the agreement, but to shew with what view the paper was written, viz. to be shewn to the other creditors. "There are two objects," said *Parke*, B., "for which it might have been given; either to bind the plaintiffs to the composition, or for the purpose of being shewn to the other creditors. Then is not the conversation evidence to shew the intention with which the paper was given, and the object for which the agreement was made?" *Reay* v. *Richardson*, 2 Cr. M. & R. 426; see *Bartlett* v. *Parnell*, 6 Nev. & M. 299; *ante*, p. 325. The case seems to rank with those which decide that failure of consideration may be alleged upon an unsealed agreement. And generally any verbal representations may be given in evidence for the purpose of establishing any fact or understanding which does not properly fall within the scope of the written agreement. *Williams* v. *Jones*, 5 B. & Cr. 108: *Hope* v. *West*, 7 Scott, 876.]

Parol evidence as to agreement between two persons, parties on the same side, to a written instrument.

[So, an agreement may be complete, as between the two opposite contracting parties to the instrument, without stating the terms of the arrangement between several persons on the one side. Thus, where A. as principal, and B. as surety, entered into a joint and several bond to N. for £1200, and C. by another bond, reciting the former bond, bound himself for the same sum, with condition to be void on payment by A. and B., or either of them. The transaction, so far as concerned the security to N., was completely expressed on the face of the instruments, and the arrangement between A., B., and C., as to the order in which they should be liable among themselves, being immaterial for the purpose of the security to N., was allowed to be made out by parol. "Evidence is admitted," said Lord *Eldon*, "to shew who is the principal and who the surety, and in order to determine that, to shew to whom the money was advanced; and why is it not to be admitted to shew to whom the money was advanced as between C. and the others?" *Craythorne* v. *Swinburne*, 14 Ves. 170: see *Davis* v. *Symonds*, 1 Cox, 402, 404.]

[So, the object for which a bond or other security is given, being

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a collateral circumstance to the legal effect of the instrument, and in the nature of a trust or personalty, (which is not within the Statute of Frauds), may be proved by parol. *Ward* v. *Lent*, Pr. Ch. 182: *Johnson* v. *Smith*, 1 Ves. sen. 314: *Stratford* v. *Powell*, 1 Ball & B. 1. See *Simpson* v. *Vaughan*, 2 Atk. 33: *Burn* v. *Burn*, 3 Ves. 573: *Ex parte Morley*, 2 Dea. & Ch. 50. (As to the jurisdiction of a court of law over its judgments in cases of mistake, fraud, &c., see *Antrobus* v. *Smith*, 12 Ves. 32). So, the remedy may be extended beyond the penalty. *Grant* v. *Grant*, 3 Russ. 598: *Clarke* v. *Lord Abingdon*, 17 Ves. 106: see *Clarke* v. *Seton*, 6 Ves. 411.]

Evidence to shew the object of a security.

[But, where a creditor compromises by writing with the principal debtor, and intends to preserve his remedy against the surety, a stipulation to that effect is so far an essential part of the transaction, that it must be inserted in the writing, and cannot be proved by parol. *Ex parte Glendining* v. *Renton*, Buck, 517.]

Parol evidence where writing does not purport to include the whole transaction.

[Again, if the writing is on the face of it defective in stating all the terms of a complete agreement, and does not purport to do so, although no evidence will be allowed to alter that which it does determine, those terms as to which it is silent may be established by parol. Thus, in *Jeffry* v. *Walton*, 1 Stark. 267, the defendant had hired a horse of the plaintiff, and the following memorandum was made at the time:—"Six weeks at two guineas. W. Watton, jun.:" and parol evidence that the defendant agreed to be answerable for accidents was admitted. "The written agreement merely regulates the time of hiring and the rate of payment, and I shall not allow any evidence to be given in contradiction of those terms; but I am of opinion that it is competent for the plaintiff to give in evidence suppletory matter as part of the agreement." Per Lord *Ellenborough*, C. J. So, (previously to Lord *Tenterden's* act) an order for goods to be manufactured was held not to exclude parol evidence of the price agreed upon. *Ingram* v. *Lee*, 2 Camp. 521: see *Trewhitt* v. *Lambert*, 3 Per. & D. 676: *Hey* v. *Moorhouse*, 8 Scott, 156.]

[Where, by the same instrument, A. agreed to purchase an estate of B., and B. agreed to purchase another estate of A., and A. failed to make a title to the estate which he was to sell to B., it was held in a suit by B. for specific performance of the contract on A.'s part, that A. could not read parol evidence to prove that the two sales were intended to be conditional: to do so would be to vary the agreement. *Croome* v. *Lediard*, 2 Myl. & K. 251.]

Parol evidence to prove fraud.

[As circumstances which constitute fraud against one of the parties to an agreement cannot be said to form any part of the agree-

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ment, the admission, in equity (*a*), of parol evidence of fraud, for the purpose of impeaching a written instrument (1 Dick. 347), seems to form no exception to the rule under consideration; even where the effect of such evidence is to prove a different contract from that which is evidenced by the writing, for the evidence is offered, not for the purpose of setting up a different agreement, but to prove fraud, or a mistake, the taking advantage of which would be fraudulent (1 Cox. 404); and for this purpose, it is indifferent whether the party impeaching the instrument for fraud is plaintiff or defendant; it is enough if he can shew that he will be defrauded if the relief he asks is refused. There is, however, in most cases, an obvious distinction between the situation of the plaintiff and the defendant; the former, if he is prevented from enforcing terms agreed upon by parol, is merely left as if no agreement had ever been made, and loses nothing but the benefit of the agreement which he might have secured by due precaution; but the defendant, if he is not allowed to vary the written evidence by parol, may be obliged to perform that which he never agreed to do, or to do a thing without receiving the stipulated advantage, which would be too hard a penalty for a mere want of precaution. This would be a kind of fraud, and for this reason, as well as on the ground that the giving specific performance at all is discretionary, courts of equity have been in the habit of allowing the defendant to shew by parol evidence, that the agreement sought to be enforced is not the true one, although a plaintiff will not generally be allowed to enforce performance of any thing which is not reduced to writing.]

Plaintiff may use parol evidence to shew fraud.

Defendant may give parol evidence to vary a writing when plaintiff may not.

[In the case of *The Att.-Gen.* v. *Sitwell*, 1 You. & C. 583, where the question was, whether a contract for the sale of a manor belonging to the crown, "with the appurtenances," should be executed with those words, which in a conveyance between subject and subject would have carried an advowson appurtenant to the manor; and it appeared, that neither party contemplated the advowson, which was of greater value than the manor; *Alderson*, B., said, as to the question, whether or not, on the ground of mistake, he could have reformed the agreement, and have directed the specific performance of it when so reformed: "I confess I should have

Distinction between executory and executed agreements, in respect of the admission of parol evidence.

(*a*) [Fraud or misrepresentation will vitiate a transaction at law, as well as in equity. See *Harman* v. *Foster*, Cowp. 117: *Anon.*, Lofft, 426: *Haynes* v. *Hare*, 1 H. Bl. 659; *Haigh* v. *Delacour*, 3 Camp. 319: *Emanuel* v. *Dacre*, Id. 299: *Doe* d. *Willis* v. *Martin*, 4 T. R. 39: *Hutchinson* v. *Morley*, 7 Scott, 341: *Cornfort* v. *Fowke*, 6 Mee. & W. 358.]

had great difficulty in holding that this could be done; because I cannot help feeling, that in the case of an executory agreement, first to reform and then to decree an execution of it, would be virtually to repeal the Statute of Frauds (*a*). The only ground on which I think the case could have been put, would have been, that the answer contained an admission of the agreement as stated in the bill; and, the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because, in such case, it would seem as if the agreement of the parties being admitted by the record, the case would no longer be within the statute. I should then have taken time to consider, whether, according to the dicta of many venerable judges, I should not have been authorised to reform an executory agreement for the conveyance of an estate, where it was admitted to have been the intention of both parties that a portion of the estate was not to pass." See *Woollam* v. *Hearn*, 7 Ves. 219: *Townshend* v. *Standgroom*, 6 Ves. 328; *infra*, p. 360.]

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[On the other hand, in *Clarke* v. *Grant*, 14 Ves. 524, Sir *W. Grant*, M. R., said—"It would be against equity, and a fraud on the defendant, to insist on his performance of an agreement which he only signed on the faith of an alteration being made in one of its terms. It has been ruled that it is not open to a plaintiff to supply or correct a term of a written agreement by parol; (*Rich* v. *Jackson*, 4 Br. C. C. 514: *Marquis of Townshend* v. *Standgroom*, 6 Ves. 328); but it has never been determined that a defendant cannot set up a parol engagement in opposition to a party, who, having entered into it, seeks to have a written agreement specifically performed independently of it. The Statute of Frauds has not altered the situation of a defendant against whom a specific performance is prayed. A defendant in such a case may give the same evidence now which he might have given before." And on this ground his Honor refused to decree performance of a written agreement, except according to a parol promise to vary it, which was proved to have been made at the time of signing. See *Clowes* v. *Higginson*, 1 Ves. & B. 524: *Pym* v. *Blackburn*, 3 Ves. 34: *Gordon* v. *Hertford*, 2 Mad. 106: *Barfield* v. *Kelly*, 4 Russ. 355: *Van* v.

Parol evidence by way of defence.

(*a*) [An agreement is executory which has not been executed on either side, and marriage articles cease to be executory after the marriage has taken place, and are subject to reformation as much as formal settlements. *Duke of Bedford* v. *Marquis of Abercorn*, 1 Myl. & Cr. 312.]

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Evidence of fraud or mistake.

Corpe, 3 Myl. & K. 269. The observations of Sir *T. Plumer*, V.-C., are important—"Fraud is not the only head upon which parol evidence may be received, and, if made out satisfactorily, a specific performance may be refused. Upon clear evidence of mistake or surprise, that the parties did not understand each other, it is introduced, not to explain or alter the agreement, but, consistently with its terms, to shew circumstances of mistake or surprise, making a specific performance, as in the case of fraud, unjust, and therefore not conformable to the principles upon which a court of equity exercises this jurisdiction. There is, however, considerable difficulty in the application of evidence under this head, calling for great caution, especially upon sales by auction, lest under this idea of introducing evidence of mistake, the rule should be relaxed by letting it in to explain, alter, contradict, and, in effect, get rid of a written agreement. In sales by auction, the real object of introducing declarations by the auctioneer, or other persons, is to explain, alter, or contradict the written contract: in effect, to substitute another contract; and independent of authority, I should be much disposed to reject such declarations, as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously, *whether offered by a plaintiff seeking performance, or by a defendant to get rid of the contract;* a distinction which it is difficult to adopt when the evidence is introduced to shew that the writing purporting to be the contract is not the contract, that there is no contract between them, if that which is proved by parol does not make part of it. That does not depend upon the principle on which a defendant is permitted to shew fraud, mistake, or surprise, *collateral to and independent of the written contract*, the object in the other case being to get rid of the contract by explaining it away. I do not recollect any instance that evidence offered in that view has been received; but there are cases in which it has been rejected. The case of *Jenkinson* v. *Pepys*, 15 Ves. 521, which I well remember, was very hard upon the vendor, who clearly intended that the plantation in the nursery should be valued distinctly from the timber which the defendant was to take with the estate. It was pressed, that, at the auction, a distinct statement was made, that there was to be a separate valuation of the nursery, and the defendant (*a*) or his agent was present and heard that declaration; but the opinion of the Court was clear, that evidence of

Jenkinson v. *Pepys*.

(*a*) [Here, therefore, the plaintiff was seeking to vary the agreement by parol evidence.]

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that declaration could not be received, being offered to supply a defect, to alter in some respect the written import of the contract. That which comes nearest to this is *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165, in which the parol evidence seems to have had the effect, in some degree, of altering the written contract, which was silent as to the expense of making out the title; but, according to the general rule, the vendee, without stipulation, must bear the expense of making out his own title. If the evidence then offered can fairly be brought under the head of mistake, the defendant who sold reluctantly having uniformly intended and given instructions accordingly, that the expense should be borne by the purchaser, that does not infringe upon the principle I have stated, that parol evidence of fraud, mistake, or surprise, may be received as a ground of defence against a specific performance." See *Higginson* v. *Clowes*, 15 Ves. 521. In each of the two cases the decision was, that the plaintiff, (who was the defendant in the other), insisting on a parol variation, could not enforce performance according to such parol variation.]

Ramsbottom v. *Gosden.*

[Some of the expressions used by Sir *T. Plumer*, in the case just cited, are not quite consistent with other dicta and decisions; and, so far as they relate to the setting up of a parol agreement by way of defence, they were extra-judicial. Indeed, the learned Judge does not appear to have sufficiently adverted to the difference between the situation of a plaintiff seeking to enforce a parol promise, and that of a defendant using the same promise negatively in answer to a bill for performance. In the case of *Croome* v. *Lediard*, 2 Myl. & K. 260, Lord *Brougham*, C., appears to have adopted Sir *T. Plumer's* opinion. Speaking of the matter which might be offered in defence to a suit for specific performance, his Lordship said, that parol evidence of matter *collateral to the agreement* might be received, but no evidence of matter *dehors* was admissible to alter the terms and substance of the agreement. If this remark mean, that mistake or fraud is matter collateral to the agreement, it amounts to nothing; for all the cases have gone upon the ground of some parol promise or understanding, varying or inconsistent with the written agreement, and the non-observance of which would amount to a fraud upon the defendant, unless he were relieved from the contract in toto. But what circumstances are sufficient to raise a case of fraud or mistake in favour of the defendant, is a question of difficult determination. In *Croome* v. *Lediard*, by a single agreement, A. agreed to purchase an estate of B., and B. agreed to purchase another estate of A., who was a solicitor, and had prepared the agreement; and A. being unable to make a good title to the estate

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purchased by B., offered in defence to a suit for specific performance of his agreement to purchase B.'s estate, parol evidence to prove that the two purchases were intended to be mutual and conditional, on the footing of an exchange; but the evidence was rejected by Sir *J. Leach*, M. R., and by Lord *Brougham* on appeal.]

Ramsbottom v. *Statham.* Parol evidence of *mistake.*

[In *Ramsbottom* v. *Statham*, 1 Ves. & B. 165. Sir *W. Grant*, M. R., admitted evidence, that the solicitor who prepared the agreement for a purchase, omitted by mistake to provide that the purchaser should bear the expense of making out the title, and on that ground refused to enforce performance against the vendor, except according to the parol agreement. In *Winch* v. *Winchester*, the particulars of sale described the estate as containing, by *estimation*, forty-one acres, *more or less*. The quantity was under *thirty-six* acres, and evidence that the auctioneer had declared at the sale that it was sold for forty-one acres, and if it proved to be less, an abatement should be made, was admitted in defence to a bill for specific performance without an abatement of price. Sir *W. Grant*, M. R., said, that the admissibility of the evidence depended upon the purpose for which it was produced. The purchaser could not insist on having the contract performed with an abatement, but he might offer the evidence for the purpose of getting rid of the contract altogether, by shewing that he was deceived by the representation, and so induced by fraud to enter into the contract. In the *Marquis of Townshend* v. *Standgroom*, 6 Ves. 328, Lord *Eldon*, C., refused to admit parol evidence of surprise in favour of a plaintiff seeking to enforce a contract as varied by such evidence, but admitted the same evidence used by the same plaintiff as a defence in another cause in which he was defendant. His Lordship, after reviewing the authorities, observed, "I will not say there are not cases in which evidence may be received to rectify a written agreement upon surprise and mistake, as well as fraud; proper irrefragable evidence, as clearly satisfactory that there has been mistake and surprise, as in the other case, that there has been fraud. I agree, those producing evidence of mistake, or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty; but it does not follow, that it is therefore incompetent to prove the actual existence of it by evidence." In the case before him, however, his Lordship, though he thought the evidence did not justify him in rectifying the written agreement, held it sufficient to induce him to refuse to enforce it as it stood. In *Gerrard* v. *Grinling*, 2 Swanst. 244, specific performance of a written contract for a lease was refused, it appearing by parol that one term of the agree-

Winch v. *Winchester.* Misrepresentation.

Marquis of Townshend v. *Standgroom*

Evidence to *reform* an agreement.

Gerrard v. *Grinling.*

ment, (namely, the insertion of an unusual covenant), was omitted, and Sir *T. Plumer*, M. R., said—" It is incumbent on the plaintiff, in such a suit, to satisfy the Court that he is entitled to specific performance of the very agreement stated in the bill; insisting on a written contract, the question must be, is that written contract conformable to the actual contract?' It is certainly competent to the defendant to shew, that, by fraud, mistake, or *otherwise*, the written contract and the actual contract differ; and it is established by the evidence on the part of the plaintiff [defendant] that such is the fact in this case. Without imputing fraud to the plaintiff, it appears that by some inadvertence this written contract has not included the terms on which the parties had agreed." See also *Twining* v. *Morrice*, 2 Br. C. C. 326.]

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[In *Calverley* v. *Williams*, 1 Ves. jun. 210, it was held, upon a bill and cross bill, that a purchaser was not entitled to a conveyance of certain acres of land, which came within the general description in the advertisement of sale, as it was not proved to have been in the contemplation of either party, nor contained in a more particular description, to which the purchaser was referred. Lord *Thurlow*, C., said, that, no doubt, if one party thought he had purchased *bonâ fide*, and the other thought he had not sold, that would be a ground for setting aside the contract, that neither party might be damaged.]

Calverley v. *Williams.*

[In *Joynes* v. *Statham*, 3 Atk. 388, a bill was filled for specific performance of an agreement for a lease. The defendant alleged that there was a mistake in the agreement with respect to the rent; that the rent was to be clear of taxes, which was not mentioned in the writing, and he offered parol evidence to prove that that was part of the agreement, which evidence was admitted by Lord *Hardwicke*, on the ground that the Court would never enforce specific performance where there was an omission by mistake or fraud, which could only be proved by parol. Lord *Hardwicke's* suggestion, that, had the defendant been the plaintiff, he might have been allowed to insist on the matter which he then used in his defence, seems to be expressed too largely. See *Preston* v. *Merceau*, 2 W. Bl. 1249; 7 Ves. 219; 3 Br. C. C. 388; and *Clinan* v. *Cooke*, 1 Sch. & Lef. 38, where Lord *Redesdale* observed, that he could find no decision except the contrary way, and added,—" The admission of such evidence as matter of defence is frequent. *Legal* v. *Miller*, 2 Ves. sen. 299. And the same doctrine is stated in *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 875; and in an older case, 1 Vern. 249. It is used to rebut an equity. The defendant says, 'The agreement you seek is not the agreement I meant to enter into,' and then he is let in to

Joynes v. *Statham.*
Parol evidence by way of *defence.*

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Operation of the Statute of Frauds.

prove fraud or mistake. It should be recollected what are the words of the statute: 'no person shall be charged upon any contract or sale of lands, *unless*,' &c.; no person shall be charged with the execution of an agreement who has not either by himself or his agent signed a written agreement: but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, 'That is not the agreement meant to have been signed.' Such a case is left as it was by the statute: it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind." See *Rann* v. *Hughes*, 7 T. R. 351, n.]

Purchase by mistake.

[Where the defendant coming into an auction room in a hurry by mistake bid for a lot which was not the lot which he intended to buy, and did not explain his mistake to the auctioneer until the conclusion of the sale, the Court refused to enforce performance against him, observing that by so doing it did not relieve him from any legal responsibility which he might have incurred, and that he would still be answerable at law for any loss which his conduct might have occasioned to the vendor. *Malins* v. *Freeman*, 2 Keen, 25.]

Terms designedly omitted from the writing.

[But a defendant cannot insist on a parol term agreed upon at the time of making the written agreement, and which was never intended to be put into writing, and therefore was not omitted by mistake or fraud. *Jackson* v. *Cator*, 5 Ves. 688, where a provision was omitted by mutual agreement for the sake of making the lease uniform with others. See *Lord Irnham* v. *Child*, 1 Br. C. C. 92, *infra*, p. 264. In *Omerod* v. *Hardman*, 5 Ves. 722, the defendant to a bill for specific performance set up a parol agreement entered into at the time of making the written agreement, that he should have possession at a certain time which had not been performed. But per *Chambre*, J., and *Graham*, B.,—"The parol agreement can only be admitted when the written agreement is not drawn according to the intention of the parties at the time. You cannot by parol add anything to what was the real agreement at the time, after that has been correctly reduced into writing." Here the Court seems to have regarded the parol agreement as an after-thought; but by the report it appears to have been contemporaneous with the writing. As to the dictum of *Graham*, B., see *Van* v. *Corpe*, 3 Myl. & K. 269, *contra*.]

In what cases

[In *Pember* v. *Mathers*, 1 Br. C. C. 54, a bill was brought by

lessees against their assignee for specific performance of his parol undertaking, to indemnify the plaintiffs against the rents and covenants, and to execute a bond for such indemnity. The purchase had been made at an auction, and the conditions of sale did not stipulate the indemnity, but it rested on parol evidence. Lord *Thurlow* held this evidence to be admissible, on the ground that where the objection is taken before the party executes the agreement, and the other party promises to rectify it, it is to be considered as a fraud, if such promise is not kept; and it being found, upon an issue, that the promise was made on the day of the execution of the assignment, a specific performance was decreed. The defendant, by his answer, denied the agreement; and Lord *Thurlow* disposed of that objection in a very characteristic manner, observing that he took the rule to be, "that where the defendant, in express terms, negatives the allegations of the bill, and the evidence is only one person affirming what has been so negatived, there the Court will neither make a decree nor send it to a trial at law. Where the Court does send it to a trial at law, it orders the answer to be read in evidence, and sends it to the Court of law only to find the consequences; because the Court of equity has such a rule, therefore it refers to a Court of law what a Court of equity ought to do (*a*). This was done by the House of Lords in *Lord Milton's case*, 6 Br. P. C. 580. The original rule stands on great authorities, so does the manner of liquidating it: I do not see great reason in either. The rule is subject to this modification, that, if there are circumstances sufficient to turn the scale, it ought to be turned; the oath of a bystander, with circumstances corroborating it, is better than that of an interested person" (*b*). See *Beaumont* v. *Bramley*, Turn. & R. 41,

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a plaintiff may read parol evidence to vary written agreement. *Pember* v. *Mathers*.

Effect of denial by answer.

(*a*) [See *Sanderson* v. *Brown*, *Hippesley* v. *Horner*, cited in *Beaumont* v. *Bramley*, Turn. & R. 46. In *Beaumont* v. *Bramley*, Lord *Eldon*, C., said, that such cases should not be sent to a jury without great consideration; it was a dangerous mode of proceeding, for, undoubtedly, more consideration had been given to the case in Chancery than could have been given by any jury.]

(*b*) [As to the weight given to a denial by the answer, see *Christ's College* v. *Widdington*, 2 Vern. 283: *Janson* v. *Rany*, 2 Atk. 14: *Arnot* v. *Briscoe*, 1 Ves. sen. 95: *Glynn* v. *B. of England*, 2 Ves. sen. 38. *Pitcairn* v. *Ogbourne*, Id. 379: *E. I. Company* v. *Donald*, 9 Ves. 275: *Hughes* v. *Garner*, 2 You. & C. 328: *Janson* v. *Solarte*, Id. 127: *Mortimer* v. *Orchard*, 2 Ves. jun. 243: *L. Cranstoun* v. *Johnston*, 3 Ves. 171: *Morphett* v. *Jones*, 1 Swanst. 172; 1 Wils. 100: *Evans* v. *Bicknell*, 6 Ves. 174: *Cooth* v. *Jackson*, Id. 40: *Savage* v. *Brockendon*, 18 Ves. 336: *Cooke* v. *Clayworth*, Id. 12: *Dawson* v. *Massey*, 1 Ball & B. 234: *Biddulph* v. *St. John*, 2 Sch. & Lef. 532: *Lindsay* v. *Linch*, Id. 1: *Beaumont* v. *Bramley*, Turn. & R. 41.]

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and the remarks of Sir *W. Grant*, M. R., on *Pember* v. *Mathers*, 14 Ves. 524: *Rich* v. *Jackson*, 4 Br. C. C. 514; 6 Ves. 334, n., does not seem to be consistent with this decision; for there, though a formal lease had not been executed, the plaintiff in equity appears to have been bound at law by the terms of the written agreement. See also *Fell* v. *Chamberlaine*, 2 Dick. 484, where the parol evidence was contradicted by the oath of the opposite party; and see 1 Eq. Abr. 230: *Baker* v. *Paine*, 1 Ves. sen. 456: *Langley* v. *Brown*, 2 Atk. 195, 203: *Jordan* v. *Sawkins*, 3 Br. C. C. 388: *Tweedale* v. *Halfpenny*, 2 P. Wms. 151: *Rogers* v. *Earl*, Dick. 294: *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375: *Barston* v. *Kilvington*, 5 Ves. 593: *Woollam* v. *Hearn*, 7 Ves. 211: *M'Neill* v. *Cahill*, 2 Bligh, O. S. 228: *Blake* v. *Marnell*, 2 Ball & B. 47; 3 Dow, 248: *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165: *Croome* v. *Lediard*, 2 Myl. & K. 251.]

What evidence will induce the Court to enforce performance with a variation.

[In *Lord Irnham* v. *Child*, 1 Br. C. C. 93, Lord *Thurlow*, C., said—"The rule of evidence is not subverted, if there is clear proof of fraud: the committing the agreement to writing is an argument against fraud. Then, as to mistake or accident, suppose it was a very clear thing that an agreement was intended, and that by accident it was extended further. But there is no such case in the books. If *admitted* to be a mistake, the Court would not overturn the rule of equity by varying the deed, but it would be an equity *dehors* the deed. *Then it should be proved as much to the satisfaction of the Court as if it were admitted.* The difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake." See 3 Br. C. C. 169; 6 Ves. 332: *Beaumont* v. *Bramley*, Turn. & R. 41. In *Shelburne* v. *Lord Inchiquin*, 1 Br. C. C. 341, 350, which was a bill for reforming a settlement, the same distinguished Judge said—"If two persons entrust to a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved, for that would be a kind of fraud. It must be an essential ingredient to any relief under this head, that it should be an accident perfectly distinct from the sense of the instrument." "To be sure it must be strong irrefragable evidence; but I do not think I can reject it as *incompetent*." See *Taylor* v. *Radd*, cit. 5 Ves. 595: *Cock* v. *Richards*, 10 Ves. 437, 441: *Pearce* v. *Verbeck*, 2 Beav. 333. In *Alexander* v. *Crosbie*, Cas. tem. Sugd. 149, Sir *E. Sugden*, C., said—"As to the authority of a Court of equity to reform a settlement, nobody can dispute its power to correct a mistake; and it is not material that the settlement was made and the property actually conveyed by it for valuable conside-

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ration; for, if any part of the property was included by mistake, the Court may take it out of settlement without compensation. But a Court of equity is always tender in varying a settlement where the effect will be to defeat vested rights, or where it is sought to do so on mere parol evidence. In all the cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence; such, for instance, as the instructions for preparing the conveyance, or a note by the attorney, and the mistake properly accounted for (*a*); but the Court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach (*b*). But in this case the parol evidence is adduced, not to shew a mistake, but to lay a foundation for shewing that there may have been a mistake."]

Henkle v. *Royal Exch. As. Com.*

[A bill to correct a policy of insurance after the loss had happened, was dismissed by Lord *Hardwicke* for want of proof; but his Lordship had no doubt that the Court had jurisdiction to relieve in respect of a plain mistake in writing, as well as against frauds in contracts, though there ought to be the strongest proof possible. *Henkle* v. *Royal Exchange Assurance Company*, 1 Ves. sen. 317. Accordingly, in *Baker* v. *Paine*, 1 Ves. sen. 456; 6 Ves. 336, n., the same learned Judge corrected a written mercantile contract which had been acted upon, by reference to the written minutes from which it had been drawn up by an attorney, together with parol evidence of mistake. So, in *D'Olliffe* v. *The South Sea Company*, cit. 2 Ves. sen. 376; 5 Ves. 600, where the parol agreement was, that the plaintiff should give security to answer in fixed damages for certain irregularities by supercargoes, provided that information should be given within two months. The instrument was not drawn up until on board the ship, and in a great hurry, and executed there by the party, who, when he got to sea and read it over, found it was written six months instead of two. Information was given after the two months, and the company brought an action, upon which *D'Olliffe* filed his bill for relief, and Lord *King*, upon being informed by the result of an issue that the true agreement was for two months, granted the relief.]

Baker v. *Paine.*

D'Olliffe v. *South Sea Company.*

Coldcot v. *Hill.*

[In *Coldcot* v. *Hill*, 1 Ch. Cas. 15; 2 Freem. 173 (14 Car. 2), Dr. Coldcot having purchased church lands in fee under the title of Cromwell, sold them in fee to the defendant's testator, and cove-

(*a*) [See *Hardwood* v. *Wallace*, cit. 2 Ves. sen. 195, *infra*, 366.]

(*b*) [See *D'Olliffe* v. *South Sea Company*, *infra*.]

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nanted that he was seised, &c. The church being restored and the estate avoided, the covenantee sued upon the covenant, and recovered damages to the value of the purchase-money. The bill was filed for relief from the covenant, suggesting a surprise, and that it was declared by Dr Coldcot when he sealed, and the defendant's testator, that it was not intended Dr. Coldcot should undertake further than against himself. Upon the hearing it was proved that the matter of the covenant was controverted in the draft, and put out by the plaintiff's counsel, and in again by the defendant's, with the omission only of the word "lawfully" before "seised." And there being some proof that it was declared upon the sealing, that the plaintiff undertook for his own acts only, the relief was granted. So in *Farrer* v. *Farrer*, Ib.; and see *Fielder* v. *Studley*, Cas. tem. Finch, 90, cit. 2 Bos. & P. 26; 3 Id. 575. See 1 Sugd. Vend. 262; *Rob* v. *Butterwick*, 2 Price, 190: *Beaumont* v. *Bramley*, Turn. & R. 41: *Sanderson* v. *Brown*, Id. 46, n. In *Young* v. *Young*, cit. 1 Dick. 205, which was a case upon a settlement, the mistake arose from a marginal note in the draft, which was copied in the engrossment; and the draft being produced, and the mistake explained, it was rectified. See *Rogers* v. *Earl*, Dickens, 294: *Thomas* v. *Davis*, Id. 301: *Exeter* v. *Exeter*, 3 Myl. & Cr. 321.]

[In *Hardwood* v. *Wallace*, cit. 2 Ves. 195, by the agreement an estate was to be settled upon the daughters of the marriage in remainder after estates tail to the sons, and the attorney drew the settlement as far as the limitations to the sons, and directed his clerk to go on as in *Pippin* v. *Ekins*, which was a precedent he delivered to him, and the clerk omitted to restrain the limitations to the daughters of the husband by that marriage, with which mistake the settlement was executed. On a bill to reform the settlement after the decease of the first wife and of the husband, the draft was proved, and the settlement in *Pippin* v. *Ekins;* but Sir *W. Fortescue* would not permit parol evidence of the attorney to be read, and held, that the other evidence would not do; that nothing appearing in writing under the hands of the parties, the settlement could not be altered. And in *Rogers* v. *Earl*, 1 Dick. 295, Sir *T. Clarke* said that he did not think, though he did not give a positive opinion, that the Court had relied upon parol evidence of mistake singly: it must be corroborated by other evidence.]

[In *Higginson* v. *Kelly*, 1 Ball & B. 252, the settlement treated the property as belonging to the husband, who was a trader, and limited it over to the wife in case of his bankruptcy, a limitation

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which would have been void had the facts been as they were stated on the instrument; but, it being proved that the property came from the wife, the settlement was corrected in that particular. See *Verner, ex parte*, Id. 260.]

[Other cases, on reforming a settlement, either from parol or internal evidence, are—*Seymour* v. *Fotherby*, 1 Vern. 320: *Griffith* v. *Buckle*, 2 Vern. 13: *Uvedale* v. *Halfpenny*, 2 P. Wms. 151; 9 Mod. 56: *West* v. *Erissey*, 2 P. Wms. 349: *Heneage* v. *Hemlocke*, 2 Atk. 456: *Partyn* v. *Roberts*, Amb. 315: *Roberts* v. *Kingsley*, 1 Ves. sen. 238: *Targus* v. *Puget*, 2 Ves. sen. 194: *Worsley* v. *E. Granville*, Id. 333: *Lady Londonderry* v. *Wayne*, Amb. 424; 2 Eden, 170: *Doran* v. *Ross*, 1 Ves. jun. 57; *Payne* v. *Collier*, Id. 171: *Randall* v. *Willis*, 5 Ves. 262: *Ainslie* v. *Medlicott*, 9 Ves. 13: *Noble* v. *Noble*, 2 Molloy, 403: *Exeter* v. *Exeter*, 3 Myl. & Cr. 321: *Pearce* v. *Verbecke*, 2 Beav. 333. As to reforming a bond, see *Crosby* v. *Middleton*, 3 Ch. Rep. 99: *Simpson* v. *Vaughan*, 2 Atk. 33: *Bishop* v. *Church*, 2 Ves. sen. 100, 371: *Burn* v. *Burn*, 3 Ves. 573: *Ex parte White* v. *White*, 2 Mon. & A. 541. As to reforming an entry on the court rolls, see *Elston* v. *Wood*, 2 Myl. & K. 678.]

Correcting bond.

Correcting Court rolls.

[It is no objection to a bill for relief against a mistake, that the mistake was made by the party himself who asks the relief, and who drew the instrument. *Bishop* v. *Church*, 2 Ves. sen. 100: *Ball* v. *Storie*, 1 Sim. & St. 210.]

Evidence on which a settlement will be rectified.

[In order to justify the Court in altering a settlement, a clear intention must be proved: it must be shewn, that the settlement does not carry into effect the intention of the parties. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the construction which the parties have put upon those doubtful or ambiguous words. It must be proved too, that there was no change of intention by which the variation between the settlement and the original contract might be explained. *Marquess of Breadalbane* v. *Marquess of Shandos*, 2 Myl. & Cr. 712. See *Partyn* v. *Roberts*, Amb. 315: *Beaumont* v. *Bramley*, Turn. & R. 41. In *Jenkins* v. *Quinchant*, 5 Ves. 596, n., a settlement was reformed, (but not against evidence), upon a letter from the husband containing instructions for drawing it, it not being shewn that there were any other instructions; and this, notwithstanding a subsequent recognition of the settlement by adding other estate, as it did not appear that the attention of the parties was drawn to the error. In *Barstow* v. *Kilvington*, 5 Ves. 593, Lord *Loughborough*, C., reformed a settlement against an heir, upon a letter of the settlor written *subsequently* to the execution of the settlement.]

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Omission by design for a fraudulent purpose, &c.

[If the term which it is proposed to insert into the instrument was omitted by mutual agreement, and especially if that was done under the supposition that it would be illegal, although erroneous, or if the suppression was made for the purpose of defrauding the law, or for any unfair purpose, equity will not lend its assistance to insert the parol agreement. *Lord Irnham* v. *Child*, 1 Br. C. C. 92: *Hare* v. *Shearwood*, 3 Br. C. C. 168; 1 Ves. jun. 241. See 6 Ves. 332: *Haynes* v. *Hare*, 1 H. Bl. 659: *Lord Portmore* v. *Morris*, 2 Br. C. C. 219: *Rosemond* v. *Milsington*, 3 Ves. 40, n. See *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375; 6 Ves. 336: *Brackenbury* v. *Brackenbury*, 2 Jac. & W. 391: *Groves* v. *Groves*, 3 You. & J. 163; and *infra*, vol. 4, p. 136.]

[In *Harvey* v. *Harvey*, 2 Ch. Ca. 180, a settlement made during the time of the Commonwealth, for the benefit of an adherent of King Charles, and with provisions contrary to the intent, for the purpose of avoiding a sequestration, was reformed after the Restoration; but as, after the Restoration, the Courts could not consider that the intent was to defraud *the law*, that case is not inconsistent with those previously cited.]

Evidence admitted to shew that transaction was illegal.

[If the transaction as it really took place was illegal, or offended against the policy of the law, the same policy allows the written evidence of the agreement to be falsified or varied by parol evidence of the illegal circumstances; and this whether the instrument is sealed or not. *Shaw* v. *Bran*, 1 Stark. 319: *Doe* d. *Chandler* v. *Ford*, 5 Nev. & M. 209. *Vide ante*, p. 352, and the remarks on Illegal Contracts, *infra*, tit. BOND.]

Parol evidence to aid *construction*.

Evidence to assist Construction.]—[Next, as to the use of parol evidence in the construction of instruments (*a*). The Court must always, as far as possible, put itself in the position of the parties to the instrument; it must acquaint itself, wherever that is necessary, with the meaning which the parties *habitually* affixed to the words used by them; it must know what circumstances were known to them, and what were unknown, in order to ascertain, not what they intended to put into writing, but what meaning they attached to the words actually used by them; and in order to obtain this information, parol evidence must be resorted to. 1 Ves. 231, 259; 15 Ves.

(*a*) [It may be observed, that, in the construction of an instrument, the punctuation, parenthetical characters, &c., are invariably disregarded. *Sanford* v. *Raikes*, 1 Meriv. 651. See 3 Atk. 8; 1 Ves. sen. 63, 121. The necessity of expressing the meaning unequivocally, without the aid of such marks, is one cause of the apparent tautology and verboseness of legal instruments.]

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514: *Doe* d. *Gwillim* v. *Gwillim*, 5 B. & Ad. 127; *Rickman* v. *Carstairs*, Id. 663: *Doe* d. *Thomas* v. *Benyon*, 4 Per. & D. 293 (*a*). As to the construction to be put upon an instrument executed by foreigners in a foreign country, see *King of Spain* v. *Machado*, 4 Russ. 225. If the writing is in a foreign language, or in an ancient character, its purport is ascertained by the testimony of persons skilled in the language or character. *Masters* v. *Masters*, 1 P. Wms. 425: *Norman* v. *Morrell*, 4 Ves. 769: *Goblet* v. *Beechey*, 3 Sim. 24. If it contains technical expressions, the meaning of those expressions is taken from competent witnesses. *Clayton* v. *Gregson*, 4 Nev. & M. 602. *Goblet* v. *Beechey*, 3 Sim. 24: *Hutchinson* v. *Bowker*, 5 Mee. & W. 535. See *Attorney-Gen.* v. *Plate Glass Company*, Anst. 39: *Houghton* v. *Gilbert*, 7 Car. & P. 701: *Bowman* v. *Horsey*, 2 M. & Rob. 85. And where the instrument contains only words of ordinary occurrence, if it appear on the face of it, or is made out by averment, that the parties belong to a class of persons by whom, or live in a district where, in similar transactions, the words are used in a different sense, parol evidence of the meaning attributed to the words by usage will be admitted. And the principle is not confined to mercantile instruments. Thus, in an action on a covenant in a lease of a warren for rabbits, left on the warren at a certain rate per thousand, evidence was admitted to shew, that, in that part of the country, a *thousand* meant *twelve hundred*. *Smith* v. *Wilson*, 3 B. & Ad. 728 (*b*). So, it was allowed

Technical words.

(*a*) [In the construction of an ancient act of Parliament, or a private writing, evidence of usage, that is, of the construction which at the time of the making of the act or writing, or as far back as can be shewn, was put upon it by the acts of parties concerned, is admissible to shew the meaning which doubtful expressions then bore. Bac. Ab. *stat.* (T. 5.); *Bank of England* v. *Anderson*, 4 Scott, 50: *Rex* v. *Varlo*, Cowp. 248: *Rex* v. *Miller*, 6 T. R. 268: *Kitchen* v. *Bartsch*, 7 East, 60: *Bailiffs, &c. of Tewkesbury* v. *Bricknell*, 2 Taunt. 120: *Wild* v. *Hornby*, 7 East, 199: *Stammers* v. *Dixon*, Id. 200: *Withnell* v. *Gartham*, 6 T. R. 388. But the acts of the parties are not allowed to influence the construction of a recent instrument, being no evidence of the meaning of the terms used in it. See *Wadley* v. *Bayless*, 5 Taunt. 752: *Atkinson* v. *Pilsworth*, 1 Ridgw. P. C. 449: *Davis* v. *Oliver*, Id. 9: *Clifton* v. *Walmsley*, 5 T. R. 564: *Iggulden* v. *May*, 7 East, 237: *Cholmondeley* v. *Clinton*, 4 Bligh. 1. But in equity, upon a question of fraud or mistake, the conduct of the parties at the time may be significant. *Bawtrey* v. *Ibson*, 1 Ch. Cas. 46.]

(*b*) [But not if the legislature has affixed a certain meaning to expressions relating to weights and measures, &c., see *Smith* v. *Wilson*: *Master, &c. of St. Cross* v. *Ld. Howard de Walden*, 6 T. R. 338. So after the alteration of the style, parol evidence of a custom to let from old Michaelmas-day, was not allowed to explain a lease by writing to hold from "Michaelmas-day." *Doe* d. *Spicer* v. *Lee*, 11 East, 312: *Doe* d. *Hall* v. *Benson*, 4 B. & Al. 588. If the letting were by parol, it would be different. Ib. See *Doe* d. *Peters* v. *Hopkinson*, 5 D. & Ry. 507.]

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to be proved, that, among mercantile men, the Gulf of Finland was considered as part of the Baltic. *Uhde* v. *Walters*, 3 Camp. 16. So where, on a sale of goods, the bought note stated, that the goods were to be delivered by the seller from certain vessels *expected to arrive about November or December*, and the sold note mentioned no time of arrival, the variance was held to be immaterial, upon parol evidence, that, by the usage of merchants, the words *expected to arrive* created no contract, but were a mere representation; and that the arrival within a given time must be *warranted*, to make it part of the contract. *Bold* v. *Rayner*, 1 Mee. & W. 343. See *Lethulier's case*, 2 Salk. 443: *Baker* v. *Paine*, 1 Ves. sen. 459: *Vallance* v. *Dewar*, 1 Camp. 503, and cases there cited: *Robertson* v. *French*, 4 East, 130: *Powell* v. *Horton*, 3 Scott, 110: *Taylor* v. *Briggs*, 2 Car. & P. 525: *Noel* v. *Lord Rochfort*, 4 Cl. & Fin. 351.]

Incidents to agreements implied by the common law.

[The universal usage of the country, or, in other words, the common law, has annexed various incidents, or implied agreements, or conditions to contracts and other transactions, whether oral or reduced to writing, beyond those which are in express words stipulated between the parties, and enforces the observance of those implied or incidental terms, so far as they are consistent with what is actually expressed by the agreement. Thus, a stipulation for a tenancy at a fixed rent, implies a right of distress in the landlord; and an assignment of a tenancy, implies an obligation on the assignee to indemnify the assignor. So, in equity, a conveyance of land as a security, subject to redemption on a day named, implies a right of redemption after that day has passed; and, upon various dealings, trusts and rights arise or are extinguished by implication from the circumstances (*ante*, p. 333). Most of these are properly cases of *construction*, in which the particular terms or conditions agreed upon are considered as symbols or tokens of the entire arrangement intended. Thus the expression "rent-service" of itself has the legal meaning of a certain periodical payment, arising out of the relation of lessee and reversioner, and enforceable by ascertained methods. If, therefore, two parties constitute between themselves that relation, and stipulate for the payment of a certain periodical sum, all the incidents of a rent-service are considered to have been impliedly agreed upon, as much as if the expression, "rent-service," had been actually used; in other words, the significancy of language is attributed to the situation into which the parties place themselves.]

Incidents annexed to agreements by particular usages.

[The depositaries and the only evidence of the general customs of the realm or common law are the breasts and knowledge of the Judges, and no further proof of matters of such general import and notoriety is required or admitted by the Courts; although the

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usages of particular places or classes of persons, by which also, as we shall see, additional terms and conditions may be imported into contracts, are not generally matters of judicial notice, and must be proved by the parties insisting on them. In the cases in which parol evidence of local usages has been offered for the purpose of construing written instruments, a distinction is taken between particular and general usage; for a usage may be general, although it affects only a particular class of transactions, or a particular body in the community, of which the whole of that portion of the common law, which is called the law of merchants, is an instance, and such usages, when once ascertained, are not to be questioned. Thus, when a bill of exchange is drawn, payable to A., the law, without any inquiry as to mercantile usage, in that particular case, intends that it is meant to be payable to A. *or order*. *Edie* v. *East India Company*, 1 W. Bl. 299; where *Foster*, J., said,—" This is now the settled law, and ought not to have been left to a jury. People talk of the custom of merchants; this word *custom* is apt to mislead our ideas. The custom of merchants, so far as the law regards it, is the custom of *England*, and therefore Lord *Coke* calls it very properly the law-merchant. We should not confound general customs with special local customs." See *Vallezjo* v. *Wheeler*, Lofft, 631. But a general custom is but an aggregate of particular customs; and if the existence of an alleged custom has not been previously recognised by the Courts, inquiry will be made and evidence admitted, to sustain the fact; though, where it is once found to be a general custom, it becomes by that finding the law of the land. See *Hunter* v. *Buring*, cit. in *Haille* v. *Smith*, 1 Bos. & P. 567. In *Lickbarrow* v. *Mason*, 2 T. R. 73, *Buller*, J., observed, that within the last thirty years, (speaking in 1787), the commercial law of this country had taken a very different turn from what it did formerly. " Before that period, we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some general certain principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future."]

What particular usages are recognised by the common law.

Custom of merchants.

[The limits of the admissibility of evidence of usage, in order to the construction of written contracts, are not very exactly defined. " How far," said *Tindal*, C. J., in *Whittaker* v. *Marson*, 2 Scott, 581, " a mercantile contract reduced to writing, and signed by the parties, which is silent on a particular point, may have that silence

Evidence of usage to affect construction.

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supplied by evidence of the general course and usage of the trade within the limits of which the contract was made, and to which it relates, is a question which it would be difficult to answer with exactness and precision." In the case of *Hutton* v. *Warren*, 1 Mee. & W. 466, the question arose upon the rights, by local usage, of an outgoing tenant; and *Parke*, B., in delivering judgment, took occasion to review the leading authorities:—" It has long been settled," observed that learned Judge, " that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life in which known usages have been established and prevailed; and this has been done upon the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course, and it would be productive of much inconvenience if this practice were now to be disturbed. The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the Court should have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties. Accordingly, in *Wigglesworth* v. *Dallison*, Doug. 201, afterwards affirmed in a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right, and Lord *Mansfield* said that the custom did not alter or contradict the lease, but only superadded something to it."

Hutton v. *Warren.*

Wigglesworth v. *Dallison.*

Senior v. *Armitage.*

" This question subsequently came under the consideration of the Court of King's Bench, in the case of *Senior* v. *Armitage*, Holt, 2 P. C. 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenant-right, Mr. Justice *Bayley*, on its appearing

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that there was a written agreement between the parties, nonsuited the plaintiff. The Court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that though there was a written contract between landlord and tenant, the custom of the country would be still binding, *if not inconsistent* with the terms of such written contract; and that not only all common-law obligations, but those imposed by custom, were in full force where the contract *did not vary them.* Mr. Holt appears to have stated the case too strongly, when he said that the Court held the custom to be operative, 'unless the agreement in *express terms* excluded it;' and probably he has not been quite accurate in attributing a similar opinion to the Lord Chief Baron *Thompson,* who presided on the second trial. It would appear that the Court held, that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it. On the second trial, the Lord Chief Baron *Thompson* held, that the custom prevailed, although the written instrument contained an expressed stipulation that all the manure made on the farm should be spent on it, or left at the end of the tenancy, *without* any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour."

Webb v. *Plummer.*

"The next reported case on this subject is that of *Webb* v. *Plummer,* 2 B. & Al. 750, in which there was a lease of down land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure or parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung, but nothing for the dung itself, and paying for grass in the ground or thrashing the corn. The claim was for a customary allowance for *foldage,* (a mode of manuring the ground), but the Court held, that, as there was an express provision for some payment on quitting for the things covenanted to be done, and an omission of foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case but that the language of the lease was equivalent to a stipulation, that the lessor should pay for the things mentioned, *and no more.*"

"The question then is, whether, from the terms of the lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour. The only clause relating to the management of the farm, (except the covenant to repair), is one which stipulated that the

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plaintiff shall spend and consume on the farm three-fourths of the hay and straw arising, not only from the farm itself, but from the demised tithes of the whole parish, leaving such as should not be spread at the end of the term for the use of the landlord, on paying a reasonable price for the same. This provision introduces and has a principal reference to a subject to which the custom of the country does not apply at all, namely, the tithes, and imposes a new obligation on the tenant *dehors* that custom, and then qualifies that obligation by an engagement, on the landlord's part, to give a remuneration by re-purchasing a part of the produce in a particular event. It is by no means to be inferred from this provision, that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting *for the ploughing,* or to plough, sow, and *manure,* he being paid for the manuring, the principle of *expressum facit cessare tacitum,* which governed the decision in *Webb* v. *Plummer,* would have applied; but that is not the case here. The custom of the country as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend." See also cases cited *infra,* Vol. 4, p. 512, and *White* v. *Sayer,* Palm. 211: *Noble* v. *Kennaway,* Doug. 510: *Hughes* v. *Gordon,* 1 Bligh, 287: *Farley* d. *Canterbury* v. *Wood,* 1 Esp. 198; Runn. Eject. 112, S. C.: *Preston* v. *Greenwood,* 4 Doug. 28: *Ongier* v. *Jennings,* 1 Camp. 505, n.: *Clinan* v. *Cooke,* 1 Sch. & Lef. 22: *Anderson* v. *Pilchier,* 2 Bos. & P. 168: *Cutter* v. *Powell,* 6 T. R. 320: *Doe* d. *Hall* v. *Benson,* 4 B. & Al. 588: *Roberts* v. *Barker,* 1 Cr. & M. 808: *Reading* v. *Mendham,* 1 M. & Rob. 236: *Magee* v. *Atkinson,* 2 M. & W. 440: *Jones* v. *Littledale,* 1 Nev. & P. 677: *Johnston* v. *Usborn,* 3 Per. & D. 236.]

Usage not admitted to contradict a writing.

[Though evidence of usage is allowed to explain an ambiguous contract, or to add terms which are consistent with those expressed, it will not be allowed to control the clear language of the instrument. Thus, Lord *Lyndhurst,* C. B., refused to admit evidence of usage, that underwriters never pay for the loss of boats slung on the outside of the ship from the davits, to control a policy in the usual form upon a ship, her tackle, apparel, ordnance, munition, *boats,* and other furniture; observing, that it was in evidence in the

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cause, and admitted upon the argument, that, upon such voyages as that, insured ships invariably carry a boat in the place in which this boat was carried, and slung as this boat was slung, and that the ship would not be properly furnished or equipped unless it had a boat in that place and so slung. The objection, then, to the parol evidence is, that it was not to explain any ambiguous words in the policy,—any words which might admit of doubt, nor to introduce matter upon which the policy was silent, but was at direct variance with the words of the policy, and in plain opposition to the language it used; that when the policy imported to be upon the ship, furniture, and apparel generally, the usage is to say, that it is not upon all the furniture and apparel, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." *Blackett* v. *Royal Exchange Assur. Co.*, 2 Cr. & J. 244. Had the boat been placed in an unusual and unsafe position the evidence might have been admitted. Ib. See *Yeates* v. *Pym*, 6 Taunt. 445; 2 Marsh. 141: *Gregory* v. *Christie*, 3 Doug. 419: *Roberts* v. *Barker*, 1 Cr. & M. 808: *Reading* v. *Mendham*, 1 M. & Rob. 26: *Cross* v. *Eglin*, 2 B. & Ad. 110.]

Parol evidence necessary to ascertain the *application* of a writing to the facts.

[Besides resorting to parol evidence for the purpose of ascertaining the general meaning which the words of a written instrument bore among the class of persons by whom, or under the circumstances in which, it was made, parol evidence must be more or less relied upon for the purpose of applying the words of the writing to the facts of the case (*a*). Thus, before a conveyance to A. B., "of

(*a*) [The circumstances of the case may also be looked at for the purpose of seeing what is the reasonable construction of words of an indefinite nature: in accordance with the maxim, —"verba generalia restringuntur ad habilitatem rei vel personæ;" on which Lord *Bacon* comments as follows: "It is a rule, that the King's grants shall not be taken or construed to a special intent; —it is not so with the grants of a common person, for they shall be extended as well to a foreign intent as to a common intent; yet with this exception, that they shall not be taken to an impertinent or a repugnant intent: for all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person. As if I grant common '*in omnibus terris meis in D.*,' and I have in D. both open grounds and several, it shall not be stretched to my common in several, much less in my gardens and orchards. So, if I grant to a man, '*omnes arbores meas crescentes super terras meas in D.*,' he shall not have apple trees or fruit trees growing in my gardens or orchards, if there be any other trees upon my ground. So, if I grant to J. S. an annuity of £10 a year *pro consilio impenso et impendendo*, if J. S. be a physician, it shall be understood of his counsel in physic; and if he be a lawyer, of his counsel in law. So, if I do let a tenement to J. S., near by my dwelling-house in a borough,

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the manor of S." can be acted upon, it must be shewn to what estate that description is applicable, and who is the person called A. B. *Quaintrell* v. *Wright*, Bunb. 274. Thus, upon the rule laid down by *Holt*, C. J., in *Cole* v. *Rawlingson*, Salk. 234; 2 Ld. Raym. 831, that the intention of a testator is not to be collected from collateral and foreign circumstances, Lord *Hardwicke*, C., observed,—"That rule is laid down much too large by Holt, for in several cases it is admitted that it must be allowed, viz. where the description or thing is uncertain, not only where two of the same name—it must be admitted to shew that the testator knew such a person; as where the testator devised to a legatee by a wrong name, which she never bore, parol evidence was allowed by the Master of the Rolls to shew that the testator knew such a person, and used to call her by a nickname. Although parol evidence cannot be read to prove intentions of the testator, after the will is reduced into writing, or declarations whom he meant by the written words of the will, yet that is different from reading it, to prove that the testator knew he had such relations, to establish which fact it may be read, but not to go any further: and though this is a nice distinction, yet it is a distinction in the reason of the thing, nor can any mischief arise from admitting it." *Goodinge* v. *Goodinge*, 1 Ves. sen. 231.]

Parcels, &c. identified by parol evidence.

[So in *Owen* v. *Thomas*, 3 Myl. & K. 350, a letter written by the defendant to his solicitor was held sufficient evidence of an agreement for a sale, although the property was only described as "the house in Newport," and the letter contained a statement by implication that the title-deeds were in the possession of a Mr. Deere. In *Sanford* v. *Raikes*, 1 Meriv. 646, a testator devised "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down." This was held to amount to a direction that the estate should be so paid for; and as to admissibility of evidence, Sir *W. Grant*, M. R., said,—"I had always understood that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent but necessary to admit extrinsic evidence to ascertain the fact, and through that medium to ascertain the subject of the devise. I do not see what this has to do with

provided that he shall not erect or use any shop in the same, without a licence, and afterwards I license him to erect a shop, and J. S. is then a miller, he shall not by virtue of these general words erect a joiner's shop."]

[This last example is not law, according to the anomalous doctrine of *Dumpor's case*, 4 Rep. 119, that a licence given in pursuance of the terms of a condition discharges the condition. *Infra*, vol. 4, p. 375.]

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cases where there is a reference to some paper that is to make a part of a will; there it may be contended that the will itself must specify the paper that is to be incorporated into it (*a*). Here the question is not upon the demise, but upon the subject of it: nothing is offered in explanation of the will, or in addition to it. The evidence is only to ascertain what is included in the description which the testator has given of the thing devised; when there is a devise of the estate purchased of A., or of the farm in the occupation of B., and nobody can tell what is given till it is shewn by extrinsic evidence what estate it was that was purchased of A., or what farm was in the occupation of B. In this case the direction with regard to the payment for the house amounted in effect to a devise of so much of the produce of the timber ordered to be cut down as should be sufficient to pay for the house. What is there in the fact here referred to, viz. an antecedent order for cutting down timber, that makes it less a subject of extrinsic evidence than such a one as I have alluded to? The moment it is shewn that it was a given number of trees growing in such a place, or ten thousand pounds' worth in value of the timber on such an estate, that the testator had ordered it to be cut down, the subject of the devise is rendered as certain as if the number, value, or situation of the trees had been specified in the will." See *Doe* d. *Templeman* v. *Martin*, 1 Nev. & M. 512.]

Reference to a plan.

[In *Hodges* v. *Horsfall*, 1 Russ. & M. 116, an agreement for granting a lease contained a provision for additions intended to be made by the lessee "as per plan agreed upon." It appeared that in the course of the negotiations several plans were produced, but it was held by Lord *Lyndhurst*, C., that the particular plan agreed upon might be identified by parol evidence.]

Rules of construction. Words taken in the primary meaning, if sensible with reference to extrinsic facts.

[Having ascertained, by reference to extrinsic circumstances, if necessary, what is the strict and primary meaning which the words of the instrument bear *in the abstract*, the next step is to apply them to the particular circumstances of the case, and if a distinct and reasonable meaning and effect can be given to them with reference to those circumstances, no evidence of intention shall be allowed to shew that the words were in fact used in a different sense and to effectuate a different intention. *Green* v. *Howard*, 1 Br. C. C. 31: *Butcher* v. *Butcher*, 1 N. R. 113. But if the words as so interpreted cannot be reasonably applied to any existing circumstances, the Court will take into consideration all the circumstances (and

Evidence admitted to shew how the words were understood by those using them.

(*a*) [See *Molineux* v. *Molineux*, Cro. Jac. 144: *Coles* v. *Trecothick*, 9 Ves. 249; and see *ante*, p. 318.]

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among other things will admit, if necessary, evidence as to what matters were within the knowledge, memory, or contemplation of the parties at the time), and see whether any meaning can be reasonably attributed to the words which is not their proper meaning, so as to give to them some effect with reference to the actual circumstances; and this whether there is any ambiguity apparent on the instrument or not. *Eden* v. *Earl of Bute*, 7 B. P. C. 445: *Verlander* v. *Codd*, Turn. & R. 352: *Allan* v. *Cameron*, 1 Cr. & Mee. 832: *Giles* v. *Giles*, 8 Sim. 360. In *Colpoys* v. *Colpoys*, Jac. 463, Sir *J. Plumer*, M. R., said, "When a legacy is given to a man by his surname, and his Christian name is not mentioned, is not that a patent ambiguity? yet it is decided that evidence is admissible. So where there is a gift of the testator's stock, that is ambiguous; so it has a different meaning when used by a farmer and a merchant. So with a bequest of jewels—if by a nobleman, it would pass all; if by a jeweller, it could not pass those which he had in his shop. Thus, the same expressions may vary in meaning, according to the circumstances of the testator." See *Le Farrant* v. *Spencer*, 1 Ves. sen. 97: *Green* v. *Howard*, 1 Br. C. C. 31: *Doe* d. *Gore* v. *Langton*, 2 B. & Ad. 695: *Blackwell* v. *Bull*, 1 Keen, 176: *Willis* v. *Curtois*, 1 Beav. 189. From the authorities just cited, it appears that the construction of words which have ordinarily no strict and definite meaning, such as "stock," "family," &c., must always be determined by the particular circumstances of the case. If the words are found upon reference to the extrinsic circumstances to bear indifferently two meanings, as, if a description of a person is applicable to two persons, or a description of a thing to two things, and it appear that one only is meant, it is concluded that only one meaning was at the time present to the mind of the person making use of the words; and if the writing itself affords no ground of construction for determining the question (*Doe* d. *Westlake* v. *Westlake*, 4 B. & Al. 57), evidence is admitted to shew what meaning was so present, and for this purpose the party's own declarations of intention may be proved (*a*). But if the words are on the face of them indeterminate

Latent and patent ambiguities.

(*a*) [So, it was resolved in *Edward Althum's case*, 8 Rep. 155, that "Every deed consists of two parts, *scil.* matter of fact, and upon the construction in law. Matter of fact is to be averred by the party and triable by the jurors; the other, being matter in law, is to be discussed by the judges of the law; and *quemadmodum ad quæstionem facti non respondent judices, ita ad quæstionem juris non respondent juratores.* And, therefore, if A. levies a fine to William his son, to have and to hold to him and his heirs; upon this fine the judge cannot make question for any matter of law; but now the party comes and avers matter in fact, and saith that A. has two sons named William, an

and do not grammatically import one ascertained person or thing, as where a gift is made to "one of the sons of A.," (2 Vern. 624), elder and younger, and his intent was to levy the fine to William the younger: this averment out of the fine is good of this matter of fact, which well stands with the words of the fine, and shall be tried by the country; and therewith agrees 47 E. 316, *b.* But if a man, by deed, gives goods to one of the sons of J. S., who has divers sons, here he shall not aver which son he intended; for by judgment in law upon this deed, this gift is void for the uncertainty, which cannot be supplied by averment. *Vide* 11 E. 4, 2, *a.*" See *Jones* v. *Newnam*, 1 W. Blackst. 60. So in *Harding* v. *Earl of Suffolk*, 1 Ch. Rep. 74, a rent-charge being granted out of the manor of *Walden*, and there being two manors of *Chippen Walden* and *Brook Walden*, and no manor of Walden *tantum* averment was let in. So in *Denn* d. *Bulkeley* v. *Wilford*, 8 Dowl. & R. 549, parol evidence was admitted to restrain a fine of "*twelve messuages, &c.*, twenty acres of land," &c., to a part of the estate; the conusor having *nineteen messuages* and eighteen acres of land in the place. But *Bayley*, J., said, "My opinion is founded, not upon the principle that parol evidence may be received for the purpose of shewing generally that the fine was intended to pass particular houses and tenements, when the terms of the fine were sufficient to pass the whole estate, but upon the ground that the parol evidence was receivable to explain what was the nature and character of the property the conusor was possessed of at the time he levied the fine. I also think that the judge, at *nisi prius*, had a right to inquire into the occasion upon which the fine was levied. Having gone so far, then it would become a mere question of construction upon the language of the fine itself." No evidence of *intention* appears to have been offered.]

[Where D. & W. were general partners under the firm of D. & Co., and they took a share with three others in a particular adventure, which D. & W. managed, and on which they affected by their agent an insurance, "for account of Messrs. D. & Co.," it was held that evidence was admissible to explain whether the general firm of D. & Co. was intended by those words, or the five who were partners in the particular adventure insured. *Carruthers* v. *Sheddon*, 1 Marsh. 416; 6 Taunt. 14.]

[In *Beaumont* v. *Field*, 1 B. & Al. 247, parol evidence was admitted to shew what was meant by a conveyance of "all the coal mines at Cold Harbour Farm, and also in the several lands now in the tenure and occupation of widow Kellett and son," and others (by name); there being at the date of the deed no persons in possession of land answering to that description, though there was a J. Kellett, son of a widow Kellett, in possession of the lands, under which the mine in question lay. This seems to have been treated as a latent ambiguity but it was obviously an inaccurate description merely. The propriety of the admission of the evidence is very questionable.]

[*Paddock* v. *Fradley*, 1 Cr. & J. 90, as reported, is still more open to objection: there, A. agreed by writing to surrender "all those brick works, being copyhold of inheritance situate at S., *then in the possession of A.*," to the use of B. & C.; and parol evidence of *intention* was admitted to extend the agreement to a close not in the *possession* of A. at the time. *Goodtitle* d. *Radford* v. *Southern*, 1 Man. & S., (*infra*, p. 394), was relied on by the court, who said, this was a case of ambiguity. But in *Goodtitle* v. *Southern* the devise was of "*all* the testator's farm, called Trogue's Farm, then in the occupation of A. C.;" and the only evidence admitted was of *facts*, to shew that land not in the occupation of A. C. formed part of Trogue's Farm; so that the case fell within the rule "*falsa demonstratio non nocet.*"]

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the inference that only one meaning was present is necessarily excluded; and to admit evidence of intention in order to fix a certain meaning upon the ambiguous words, would be not to shew what the writing means, but to express that by parol which the writing, on the face of it, does not purport to express. See *Butcher* v. *Butcher*, 1 N. R. 113. Hence the maxim, "*Ambiguitas latens verificatione suppletur*" (*a*). The rule that a *patent* ambiguity cannot be removed by evidence must (especially since the case of *Doe* d. *Gord* v. *Needs*, stated *infra*, p. 396) be taken with the very important qualification that an ambiguity which does not appear by the very words or clause of which the meaning is in question, is susceptible of explanation by averment, although taking the whole of the writing together, the ambiguity is apparent without reference to extrinsic circumstances:—a clause which is complete in itself and expresses a distinct unambiguous intention, will not be taken out of the reach of parol explanation by a wholly distinct clause in the same instrument, which discloses facts upon which the ambiguity arises. In the case referred to, there was a devise to "George Gord, the son of Gord;" and by other devises in the same will, it appeared that there was a George Gord, the son of George Gord, and another George Gord, the son of John Gord; yet evidence of intention was admitted to shew which was meant (*b*). See *Price* v. *Page*, 4 Ves. 680: *Colpoys* v. *Colpoys*, Jac. 463. So a mere inaccuracy or obscurity, though patent, may, consistently with this rule, be explained by reference to extrinsic *circumstances;* for though words which it must be con-

[If the intention cannot be ascertained, the clause fails for uncertainty, except in the case of a bequest to charitable purposes; when, if there are two charities equally answering the description, the gift will be executed *cy pres*, dividing it between them. *Simon* v. *Barber*, 5 Russ. 112: *Bennett* v. *Hayter*, 2 Beav. 81.]

(*a*) [The dictum in *Shortrede* v. *Cheek*, 1 Ad. & El. 57; *ante*, p. 329, which seems to be inconsistent with this rule, is perhaps distinguishable on account of the particular doctrine for which it is cited in the page referred to, namely, that it is essential to the validity of a guarantee that the consideration should be stated.]

(*b*) [A point similar to that which occurred in the case of *Doe* v. *Needs* was attempted to be raised in *Doe* d. *Morgan* v. *Morgan*, 1 Cr. & M. 235, where the testator devised an estate to his wife for life, and then to "his nephew Morgan Morgan," and immediately afterwards devised another estate in possession to "his nephew, Morgan Morgan, of the village of Mothvey;" it was contended that this was, *primâ facie*, ambiguous, as the terms of the will shewed that two different persons were intended: but the answer was obvious, that if the will shewed that there were two Morgans, it also afforded the means of ascertaining which was meant. The Court held, that there was a latent ambiguity, and admitted evidence of the testator's declaration. See *Doe* d. *Westlake* v. *Westlake*, 4 B. & Al. 57; *Doe* v. *Allen*, 4 Jurist, 985.]

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cluded were inexpressive or ambiguous to the apprehension of the parties themselves, cannot be eked out by evidence of *intention*, yet the writing itself is not conclusive evidence that the words were so deficient in meaning, and extrinsic facts may be looked to for the purpose of discovering whether words, apparently senseless or ambiguous, had a definite meaning in the minds of those who used them (*a*). And words which have no meaning at all with reference to the facts may be rejected for the purpose of giving effect to words with which they are associated, and which are capable of a certain application:—this is the maxim, "*Falsa demonstratio non nocet.*" That which, *under the circumstances*, has no meaning, may be considered in the light of surplusage, and parol evidence is allowed to remove surplusage, though not to supply defects. Godb. 131. See *Hodgson* v. *Hodgson*, 2 Vern. 593: *Atkinson* v. *Pilsworth*, 1 Ridgw. P. C. 461.]

Rejection of senseless words.

[Upon this subject the remarks of Lord *Bacon*, though not always consistent with authority, throw considerable light. On the maxim, "*Præsentia corporis tollit errorem nominis, et veritas nominis errorem demonstrationis*," (Reg. 25,) he observes, "There be three degrees of certainty; 1st, presence; 2nd, name; 3rd, demonstration or reference; whereof the presence the law holdeth of greatest dignity, the name in the second degree, and the demonstration or reference in the lowest; and always the error or falsity in the less worthy. And therefore, if I give a horse to J. D., being present, and say unto him, 'J. S. take this;' this is a good gift, notwithstanding I call him by a wrong name. But so had it not been if I had delivered him to a stranger, to the use of J. S., when I meant J. D. So, if I say unto J. S., 'Here, I give you my ring with the ruby,' and deliver it with my hand, and the ring bear a diamond and no

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Where description is partly inapplicable, which part to be preferred.

(*a*) [Thus, in a recent case, where an estate was devised to be divided in four parts, "between one child of Thomas Davies, one child of Samuel Beddoes, one child of Anne Davies, and one child of Margaret Davies." with a gift over, in case "the aforesaid Thomas Davies, Anne Davies, and Margaret Davies, should never have any lawful children," it was held to be a devise to the eldest child of each of the four persons named in the will; it appearing, that at the date of the will one of them only, Samuel Beddoes, had a child, who was a daughter. Lord *Langdale*, M. R., considered that the omission in the gift over of the share devised to the child of S. Beddoes shewed that the testator considered that that one child would take, and added, "considering that here there is not a gift to one of several children, which would be uncertain, but a gift to one child of each four persons; that as to one, the testator has himself indicated, that the only one in esse would take; that in the three other cases the will is so expressed, that the gift may vest immediately on the coming into esse of the first child, and that thereupon the gift over would fail, I think that the devise ought not to be considered as void." *Powell* v. *Davies*, 1 Beav. 532.]

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ruby, this is a good gift, notwithstanding I name it amiss. So had it been if, by word or writing, without the delivery of the thing itself, I had given the ring with the ruby, although I had no such, but only one with a diamond, which I meant, yet it would have passed. So, if I by deed grant unto you, by general words, all the lands that the king hath passed unto me by letters patent, dated 10th May, unto this present indenture annexed, and the patent annexed have date 10th July; yet if it be proved that that was the true patent annexed, the presence of the patent maketh the error of the date recited not material; yet if no patent had been annexed, and there had been also no other certainty given but the reference of the patent, the date whereof was misrecited, although I had no other patent ever of the king, yet nothing would have passed."]

["Like law it is, but more doubtful, where there is not a presence, but a kind of representation, which is less worthy than a presence, and yet more worthy than a name or reference. As if I covenant with my ward that I will tender unto him no other marriage than the gentlewoman whose picture I delivered him, and the picture hath about it, '*Ætatis suæ anno* 16,' and the gentlewoman is seventeen years old, yet nevertheless if it can be proved that the picture was made for that gentlewoman, I may, notwithstanding this mistaking, tender her well enough. So, if I grant you for life a way over my land, according to a plot intended between us, and afterwards I grant unto you and your heirs a way according to the first plot intended, whereof a table is annexed to these presents, and there be some special variance between the table and the original plot, yet this representation shall be certainty sufficient to lead unto the first plot, and you shall have the way in fee nevertheless, according to the first plot, and not according to the table. So, if I grant unto you by general words, the land which the king hath granted me by his letters patent, *quarum tenor sequitur in hæc verba*, &c., and there be some mistaking in the recital, and variance from the original patent, although it be in a point material, yet the representation of this whole patent shall be as the annexing of the true patent, and the grant shall not be void for this variance."]

["Now for the second part of this rule, touching the name and the reference:—for the explaining thereof it must be noted what things sound in demonstration or addition; as, first in lands, the greatest certainty is, where the land hath a name proper, as 'The Manor of Dale,' 'Grandfield,' &c.; the next is equal to that, where the land is set forth by bounds and abuttals, as 'a close of pasture, bounding on the east part upon Emsdenwood, on the south upon,' &c. It is

also a sufficient name to lay the general boundary, that is, some place of larger precinct, if there be no other land to pass in the same precinct, as 'all my lands in Dale,' 'my tenement in St. Dunstan's parish,' &c. A farther sort of demonstration is, to name lands by the attendancy they have to other lands more notorious; as 'parcel of my manor of D., belonging to such a college, lying upon Thames' bank.' "]

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["All these things are notes found in denomination of lands, because they be signs to call, and therefore of property to signify and name a place; but those notes that sound only in demonstration and addition, are such as are but transitory and accidental to the nature of the place. As, *modo in tenura et occupatione* of the proprietary tenure or possession, is but a thing transitory in respect of land; *Generatio venit, generatio migrat, terra autem manet in æternum.* So likewise matter of convenience, title or instrument. As, '*quæ perquisivi de J. D.;*' '*quæ descendebant à J. N. patre meo;*' or, '*in prædictâ indenturâ dimissionis,*' or, '*in prædictis literis patentibus specificat.*' So likewise, '*continens per æstimationem viginti acras,*' or if '*per æstimationem*' be left out, all is one; for it is understood, and this matter of measuring, although it seem local, yet it is indeed but opinion and observation of men."]

["The distinction being made, the rule is to be examined by it. Therefore, if I grant my manor of *Dale*, in the parish of *Hurst*, in the county of Southampton, and the parish likewise extendeth into the county of Berkshire, and the whole close of *Dale* lieth in the county of Berkshire, yet, because the parcel is especially named, the falsity of the addition hurteth not; and yet this addition is found in name, but (as it was said) it was less worthy than a proper name. So, if I grant '*tenementum meum,*' or '*omnia tenementa mea,*' (for the universal and indefinite to this purpose are all one), '*in parochiâ sancti Butolphi extra Aldgate,*' (where the verity is *extra Bishopsgate*), '*in tenurâ Gulielmi,*' which is true, yet this grant is void, because that which sounds in denomination is false, which is the more worthy, and that which sounds is addition is true, which is the less; and although *in tenurâ Gulielmi* (*a*), which is true, had

(*a*) [This position seems to be erroneous; indeed the whole of Lord *Bacon's* classification of degrees of worthiness, though correct in the abstract, may be excluded by the circumstances of the case; and among those circumstances, the fact, that the description by the most worthy sign is inapplicable, does itself afford a strong inference that the less worthy sign, which is applicable, was most present and significant to the mind of the party using it; and, therefore, *on that occasion*, most worthy. Whatever may be the *worthiness* of the false part of the description, unless it shews that there was some substantial mistake as to the thing or person intended it will be rejected; and what

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been first placed, yet it had been all one. But if I grant '*tenementum meum quod perquisivi de R. C. in Dale*,' when the truth was T. C., and I have no other tenements in Dale but one, the grant is good, because that which soundeth in name (viz. '*In Dale*') is true, and that which soundeth in addition (viz. '*quod perquisivi*,' &c.) is only false. So, if I grant '*Prata mea in Sale continentia decem acras*,' and they contain indeed twenty acres, the whole twenty pass. So if I grant all my lands, 'being parcels *manerii de D., in prædictis literis patentibus specificat.*,' and there be no letters patent, yet the grant is good enough."]

["The like reason holds in demonstrations of persons that have been declared in demonstrations of lands and places; the proper name of every one is certainty worthiest, next are such appellations as are fixed to his person, or at least of continuance, as son of such a man, wife of such a husband; or addition of office, as clerk of such a court, &c.; and the third are actions or accidents which sound no way in appellation or name, but only in circumstance, which are less

remains of the description, if sufficiently certain, will take effect. The position in the text is directly opposed to a resolution in *Dowtie's case*, 3 Rep. 10: 1 Leon. 21, where the effect of a bargain and sale of "tenements and cottages, situate in the parish of *St. Andrew*, in Holborn, in the occupation and tenure of William Gardiner," came in question. It appearing that the only tenements in the occupation of William Gardiner lay in the parish of *St. Sepulchre*, it was held, "that notwithstanding the latter certainty, *scil.* in the tenure of William Gardiner, was true; yet because the first certainty, *scil.* in the parish of St. Andrew, in Holborn, was false; for this cause the bargain and sale was utterly void. But otherwise had it been, if a true certainty had been in the *first* place, as if he had bargained and sold 'the tenements, &c., in the tenure of W. Gardiner, in the parish of St. Andrew, Holborn,' then it was agreed that the tenements shall pass well enough, notwithstanding the addition of the falsity; for *utile per inutile non vitiatur.*" See *Trapp's case*, 3 Leon. 235, S. P. But *Hobart*, C. J., says, as to this distinction (which would certainly find no countenance at the present day)—"Indeed, in one sentence it is vain to imagine one part before another, for the words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence." The resolutions in *Doddington's case*, 2 Rep. 33, shew also that the rule of construction is not so inflexible as Lord *Bacon* states it to be. There a general grant, from the crown, of all the crown lands, &c., in the tenure of T. Gibbs, J. Brown (and others by their names), situate in the city of Wells, and formerly belonging to the hospital of Wells, was held not to pass lands in the tenure of J. Brown, which had belonged to the hospital of Wells, but which lay in the parish of D., and not in Wells, although these lands were necessary to make up the value specified in the grant, and although J. Brown occupied no such lands in Wells. Here the *first* certainty was true, but the Court relied on the generality of the grant, and said, it would have been otherwise, if the grant had comprehended any convenient certainty, as of a manor, farm, land known by a certain name, or containing so many acres, &c. See Co. Litt. 13. *a.*: *Bozoun's case*, 4 Rep. 35: *Wrotesley* v. *Adams*, Plowd. 191; Id. 395: *Thomas* v. *Thomas*, 6 T. R. 673; *Doe* d. *Le Chevalier* v. *Huthwaite*, 3 B. & Al. 633, *infra*, p. 394.]

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worthy, although they may have a more particular reference to the intention of the grant. And, therefore, if an obligation be made to J. S., '*filio et hæredi G. S.*,' when indeed, he is a bastard, yet this obligation is good. So, if I grant land, '*Episcopo nunc Londinense qui me erudivit in pueritiâ*;' this is a good grant, although he never instructed me. But, *è converso*, if I grant land to 'J. S. *filio et hæredi G. S.*,' and it be true that he is son and heir unto G. S., but his name is *Thomas*, this is a void grant (*a*). Or, if in the former grant it was the Bishop of Canterbury who taught me in my childhood, yet shall it be good (as was said) to the Bishop of London, and not to the Bishop of Canterbury."]

["The same rule holdeth of denomination of times, which are, such a day of the month, such a day of the week, such a saint's day or eve, to-day, to-morrow; these are *names* of times. But 'the day that I was born,' 'the day that I was married;' these are but *circumstances* and *additions* of times. And, therefore, if I bind myself to do some personal attendance upon you 'upon Innocents' day, being the day of your birth,' and you were not born that day, yet shall I attend."]

["There resteth two questions of difficulty yet upon this rule; first, of such things whereof men take not so much note as that they shall fail of this distinction of name and addition: as, 'my box of ivory lying in my study, sealed up with my seal of arms; my suit of arras with the story of the Nativity and Passion.' Of such things there can be no name, but all is of description and of circumstance; and of these I hold the law to be, that precise truth of all recited circumstances is not required. But, in such things, *ex multitudine signorum colligitur identitas vera*; therefore, though my box were [not] sealed, and although the arras had the story of the Nativity and not of the Passion, if I had no other box, nor no other suit, the gifts are good, and there is a certainty sufficient; for the law doth not expect a precise description of such things as have no certain denomination."

"Secondly, of such things as do admit the distinction of name and addition, but the notes fall out to be of equal dignity—all of name or addition; as '*prata mea juxta communem fossam in D.*,' whereof the one is true—the other false; or, *tenementum meum in tenurâ Gulielmi quod perquisivi de R. C. in prædict. indent. specificat.*,' whereof one is true and two are false, or two are true and one

(*a*) [See the note, *ante*, p. 383. The next example given by Lord *Bacon* supports the conclusion there drawn.]

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false. So, '*ad curiam quam tenebat die Mercurii tertio die Martii,*' where the one is true, the other false. In these cases, the former rule, *ex multitudine signorum,* &c., holdeth not, neither is the placing of the falsity or verity first or last material; but all must be true, or else the grant is void (*a*); always understood, that if you can reconcile all the words, and make no falsity, that is quite out of this rule, which hath place only where there is a direct contrarity or falsity not to be reconciled to this rule. As, if I grant 'all my land in D. *in tenurâ J. S.*, which I purchased of J. N., specified in a devise to J. D.;' and I have land in D., whereof in part of them all these circumstances are true; but I have other lands in D., wherein some of them fail, this grant will not pass all my land in D., for then these are references, and not words of falsity or error, but of limitation and restraint." See Hob. 171: *Doddington's case,* 2 Rep. 33: *Pacy* v. *Knolls,* Cro. Car. 447, 473: *Door* v. *Geary,* 1 Ves. sen. 255: *Day* v. *Trigg,* 1 P. Wms. 286: *Doe* d. *Davis* v. *Williams,* 1 H. Bl. 25: *Pradwin* v. *Harpur,* Amb. 374: *Andrews* v. *Dobson,* 1 Cox. 425: *Hodgson* v. *Hodgson,* 2 Vern. 593: *Goodtitle* d. *Radford* v. *Southern,* 1 Mau. & S. 299, *infra,* p. 395; *Lambe* v. *Reaston,* 5 Taunt. 207: 1 Marsh. 23: *Wilkinson* v. *Malin,* 2 Cr. & J. 636: *Doe* d. *Gore* v. *Langton,* 2 B. & Ad. 680: *Doe* d. *Smith* v. *Galloway,* 5 Id. 43: 2 Nev. & M. 240.]

Falsa demonstratio.

[Upon the maxim, "*non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram,*" Lord *Bacon* observes, (Maxims, Reg. 13), "Though falsity of addition or demonstration doth not hurt where you give the thing a proper name, yet nevertheless, *if it stand doubtful* upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, *the law will never intend error or falsehood.* Therefore, if the parish of *Hurst* do extend into the counties of *Wilts* and *Berks,* and I grant my close, called *Callis,* situate and lying in the parish of *Hurst,* in the county of *Wilts,* and the truth is, that the whole close lieth in the county of Berks, yet the law is, that it passeth well enough, because there is a certainty sufficient in that I have given it a proper name, which the false reference doth not destroy, and not upon the reason that these words, 'in the county of Wilts,' shall be taken to go to the parish only, and so be true in some sort, and not to the close, and so to be false. For, if I had granted *omnes terras meas in parochiâ de Hurst in com. Wilts* and I had no lands in Wilts, but in

(*a*) [*Vide ante,* p. 383, n.]

Berks, nothing had passed. But, [So] in the principal case, if the close called Callis had extended part into Wilts and part into Berks, then only that part had passed which lay in Wilts."]

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["So, if I grant '*omnes et singulas terras meas in tenurâ J. D., quas perquisivi de J. N., in indenturâ dimissionis fact. J. B. specificat.;*' if I have lands wherein some of these references are true and the rest false, and no land wherein they are all true, nothing passeth, as if I have land in the tenure of J. D., and purchased of J. N., but not specified in the indenture to J. B.; or if I have land which I purchased of J. N., and specified in the indenture of demise to J. B., and not in the tenure of J. D. But, if I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all these circumstances are true." See *Doe* d. *Ashforth* v. *Bower,* 3 B. & Ad. 453: *Doe* d. *Tyrrell* v. *Lyford,* 4 Mau. & Sel. 550: *Gill* v. *Shelley,* 2 Russ. & M. 336: *Newton* v. *Lucas,* 6 Sim. 60.]

Latent ambiguities.

[On the maxim, "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur,*" (Reg. 23,) Lord *Bacon* observes, "There be two sorts of ambiguities of words: the one is *ambiguitas patens,* and the other *latens. Patens* is that which appears to be ambiguous upon the deed or instrument, *latens* is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."]

["*Ambiguitas patens* is never holpen by averment (*a*), and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so in effect that to pass without deed which the law appointeth shall not pass but by deed. Therefore, if a man give land 'to J. D. and J. S., *et hæredibus,*' and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. So, if a man give land in tail, though it be by will, the remainder in tail, and add a proviso in this manner; 'Provided, that if he or they, or any of them, do any,' &c., according to the usual clauses of perpetuities, it cannot be averred upon the ambi-

(*a*) [As to the restrictions subject to which this doctrine must be understood, *vide ante,* p. 380.]

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guities of the reference of this clause, that the intent of the devisor was that the restraint should go only to him in the remainder and the heirs of his body, and that the tenant in tail in possession was meant to be at large. Of these, infinite cases might be put, for it holdeth generally, that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty (*a*)."]

["But, if it be *ambiguitas latens*, otherwise it is; as if I grant my manor of S. to J. F. and his heirs: here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and North S., this ambiguity is matter in fact, and therefore it shall be holpen by averment whether of them was that the party intended to pass (*b*). So, if I set forth my land by quantity, then it shall be supplied by election and not averment. As if I grant ten acres of wood in *Sale*, where I have a hundred acres, whether I say it in my deed or no that I grant out of my hundred acres, yet here shall be an election in the grantee which ten he will take; and the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election. But, in the former case, the difference holdeth where it is expressed and

Ambiguity in some cases supplied by election.

(*a*) [See *Lane* v. *Cowper*, Moore, 103: *Edward Altham's* case, 8 Rep. 155; Hob. 32: *Lepiot* v. *Brown*, 1 Salk. 7. In *Cheyne's case*, 5 Rep. 68, the rule is laid down to the same effect: "If a man has two sons, both baptized by the name of John, and conceiving that the elder (who has been long absent) is dead, devises his land, by his will in writing, to his son John generally, and in truth the elder is living; in this case the younger son may, in pleading or in evidence, allege the devise to him." "And no inconvenience can rise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment; for when he sees the devise to his son John, he ought at his peril to inquire which John the testator intended, which may be easily known by him who wrote the will and others who were privy to his intent: and if no direct proof can be made of his intent, then the devise is void for the uncertainty." Ib.]

(*b*) [Co. Litt. 145. a.: *Grace Marshall's case*, 8 Vin. Abr. *Copyh.* 48, pl. 11, *S. C.*: Dy. 821 a, n. See *Hobson* v. *Blackburn*, 1 Myl. & K. 571: *Peck* v. *Halsey*, 2 P. Wms. 387. But a case of election must be distinguished from a case of uncertainty, for unless the grant or devise is so expressed as to lead reasonably to the conclusion that an election in the grantee or devisee was intended, the gift, if not helped by parol evidence, shall fail for uncertainty; as, where a testator devised his close in the occupation of V., and there were two closes so occupied; and there was no evidence to shew which was meant. *Richardson* v. *Watson*, 4 B. & Ad. 787.]

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Lord Bacon's maxims.

where not; for if I recite, 'whereas I am seised of the manor of North S. and South S., I lease unto you, *unum manerium de S.*,' then it is clearly an election. So, if I recite, 'whereas, I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*,' there it is an election, not averment of intention, except the intent were of an election, which may be specially averred (*a*)."]

["Another sort of *ambiguitas latens* is correlative unto these; for this ambiguity spoken of before, is when one name and appellation doth denominate divers things; and the second, when the same thing is called by divers names. As, if I give lands to Christ Church in Oxford, and the name of the corporation is, *Ecclesia Christi in Universitate Oxford:* this shall be holpen by averment, because there appears no ambiguity in the words; for this variance is matter in fact; but the averment shall not be of intention, because it doth stand with the words. For, in the case of equivocation, the general intent includes both the special, and therefore stands with the words. But so it is not in variance, and therefore the averment must be of matter that do endure quantity and not intention. As to say of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant should be to Christ Church in the University of Oxford."]

Recent decisions as to the admissibility of parol evidence in aid of construction.

Rules of evidence are the same with respect to deeds as to wills.

[The present state of the law upon the subject of the last few pages will be best understood from a statement of three recent cases, in which the doctrine was very elaborately examined, and by which it is thought to have been placed upon a satisfactory foundation, They were cases which arose upon the construction of wills; and the observations of the Judges who decided them were generally confined to that class of instruments; but, as will be presently shewn, there is no difference between wills and other instruments, so far as this subject is concerned; some few words have a settled technical meaning in deeds, which are more flexible in wills, not because parol evidence is less easily admissible to explain deeds than wills, but in consequence of certain arbitrary rules of the common law, which do not allow of the use of different words in deeds, however clear they may be to express intention. See *Carrick* v. *Mandeville*, 3 Ridgw. P. C. 365 : *Bayley* v. *Morris*, 4 Ves. 788 : *Hodgson* v. *Bussey*, 2 Atk. 91 : *Goodtitle* d. *Edwards* v. *Bailey*,

(*a*) [See *Doe* d. *Malden* v. *Miller*, 1 B. & Al. 699. This does not seem to be a case of *ambiguity*, that is to say, of *double* meaning.]

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Cowp. 600: *Gibson* v. *Minet*, 2 Br. P. C. 48; 3 T. R. 481: *Solly* v. *Forbes*, 4 J. B. Moore, 448 (*a*).]

Miller v. *Travers.*

[In *Miller* v. *Travers*, 1 Moo. & Sc. 342, the question arose upon a devise to trustees of "all my freehold and real estates whatsoever, situate in the county of Limerick and in the city of Limerick;" the testator, at the date of his will, having a small real estate in the *city of Limerick*, considerable real estates in the *county of Clare*, and no real estate in the *county of Limerick*. The plaintiff offered parol evidence, to shew, from the smallness of the estate in the city of Limerick in proportion to the nature of the charges laid on it, and the trusts declared, the probability that the estates in Clare were intended to pass; and further, from a draft of the will approved by the testator, that he had actually intended them to pass; and that the county of Clare was omitted by mistake by the conveyancer. The Lord Chancellor having required the assistance of Lord C. J. *Tindal* and Lord C. B. *Lyndhurst*, the former learned Judge delivered the joint opinion in the Court of Chancery, Hilary Term, 1832:—]

Evidence of

["Upon the fullest consideration, it appears to the Lord Chief

(*a*) [Thus, in deciding that in a surrender of copyholds, the word "or" should be construed to mean "and," Lord *Kenyon*, C. J., said,—"There is no doubt but that a surrender is considered as a common law conveyance, and is not entitled to the same favourable construction as a will; and therefore, unless the surrenderor in this case has used the language which will confer a legal estate, it cannot be confined. In deeds certain legal phrases must be used in order to create certain estates; as the word 'heirs,' to create a fee, and 'heirs of the body,' to create an estate in tail. But beyond that I would say with Lord *Hardwicke*, that there is no magic in particular words, further than as they shew the intention of the parties." *Wright* d. *Burrill* v. *Kemp*, 3 T. R. 473. See also *Shelburne* v. *Inchiquin*, 1 Br. C. C. 350: *Rex* v. *Laindon*, 8 T. R. 379: *Smith* v. *Doe* d. *Jersey*, 2 Br. & B. 541, 545, 550: *Simons* v. *Johnson*, 3 Ad. & El. 181. In *Doe* d. *Freeland* v. *Burt*, the defendant claimed under a lease from the assignee of the plaintiff, of certain parts of a house in town, described to be "one room on the ground-floor, with the cellar thereunder, and a vault contiguous and adjoining thereto, and three rooms; together with the ground whereon the same now stand, and together with a piece of ground on the north side," particularly describing it, with the exception of a right of way, and the whole were devised to have been late in the occupation of A. The action was brought to recover a vault which was under the premises demised to the defendant. Evidence was admitted to shew that at the time of the lease the vault was in the occupation of B., another tenant, and not intended to pass. *Ashurst*, J., said,—"It seems to me the construction of all deeds must be made with a reference to their subject-matter, and it may be necessary to put a different construction in cases made in populous cities from that on those made in the country. In the present case, considering the nature of the property, it was proper to let in evidence to shew the state and condition of it at the time the lease was granted." 1 T. R. 701.]

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Baron and myself, that, admitting it may be shewn from the description of the property in the city of Limerick, that *some* mistake may have arisen, yet still as the devise in question has a certain operation and effect, namely the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given."]

mistake not admissible where the words are capable of some operation.

["It may be admitted, that, in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, '*Ambiguitas latens verificatione suppletur.*'"]

["The cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator, it is found that there is more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will; as, where the testator devises his manor *Dale*, and at his death it is found that he has two manors of that name, *North Dale* and *South Dale;* or where a man devises to his son *John*, and he has two sons of that name. In each of these cases respectively parol evidence is admissible, to shew which manor was intended to pass, and which son was intended to take. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular; as, where an estate is devised, called A., and is devised as in the occupation of B., and it is found that there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person, whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate, in which latter class of cases parol evidence is admissible, to shew what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of

Ambiguity raised by evidence, may be dispelled by evidence.

Description equally applicable to two persons or things.

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intention appearing on the face of the will to justify the application of the evidence."]

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["But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed any description whatever of the estates in *Clare*. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but, in order to make out such intention, is compelled to introduce new words, and a new description into the body of the will itself. The testator devises all his estates in the county of Limerick, and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found upon inquiry, that the testator has property in the city of Limerick, which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, nor any difficulty in the application of the words of the will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which the testator has in the city of Limerick, but passes no estate in the county of Limerick, where he had no estate to answer that description."]

New matter cannot be introduced by parol.

["The plaintiff, however, contends that he has a right to prove that the testator intended to pass not only the estate in the city of *Limerick*, but an estate in a county not named in the will, namely, the county of *Clare*, and that the will is to be read and construed as if the word *Clare* stood in the place of, or in addition to that of Limerick. But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property, but it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will. It is not simply removing a difficulty arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect as the filling up a blank which the testator might have left in his will (*a*). It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted."]

["Now the first objection to the introduction of such evidence is,

(*a*) [*Baylis* v. *Att-Gen*, 2 Atk. 239: *Castleton* v. *Turner*, 3 Id. 257: *Hunt* v. *Hort*, 3 B. C. C. 311. A blank in the Christian name of a legatee was allowed to be supplied. *Price* v. *Page*, 4 Ves. 680; and where the bequest was "to Mrs. G.," the Master was directed in general terms to inquire who was meant. *Abbot* v. *Massie*, 3 Ves. 148.]

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that it is inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. *Denn* v. *Page*, 3 T. R. 87. But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself: as, however, the copy of the will, which omitted the name of the county of Clare was for some time in the custody of the testator, and therefore open for his inspection, which copy was afterwards executed by him with all the formalities required by the Statute of Frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee altogether omitted in the will? If it is admissible to *introduce* new matter of devise, or a new devisee, why not to *strike out* such as are contained in the executed will? The effect of such evidence in either case would be that the will, though made *in form* by the testator in his lifetime, would *really* be made by the attorney after his death; that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed."]

["Upon an examination of the decided cases on which the plaintiff has relied in argument, none will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to, that an uncertainty which arises from applying the description contained in the will, either to the thing devised or to the person of the devisee, may be helped by parol evidence, but that a new subject-matter of devise or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself. Thus, in the case of *Love* v. *Lord Huntingtower*, 4 Russ. 581, n., it was held that evidence of collateral circumstances was admissible, as, of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will. Such evidence, it is to be observed, is not admitted to introduce new

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words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family; the evidence is produced to prove facts which, according to the language of Lord *Coke, stand well,* with the words of the will. 8 Rep. 155."]

Standen v. *Standen.*

["The case of *Standen* v. *Standen,* 2 Ves. sen. 589, decides no more than that a devise of all the residue of the testator's real estate, when he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that by the words used in the will the testator meant to refer to the power of appointment. The case of *Mosley* v. *Massey,* 8 East, 149, does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor, having been applied to the estate in Monmouth, and *vice versâ,* the Court held that it was sufficiently to be collected from the words of the will itself which estate the testator meant to give to the one devisee and which to the other, independently of their local description; all, therefore, that was done was to reject the local description as unnecessary, and not to import any new description into the will. In the case of *Selwood* v. *Mildmay,* 3 Ves. 306, the testator devised to his wife part of his stock in the £4 per cent. annuities of the Bank of England, and it was shewn by parol evidence that at the time he made his will he had no stock in the £4 per cent. annuities, but that he had some which he had sold out, and had invested the produce in long annuities: and it was held that the bequest was in substance a bequest of stock, using the word as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the long annuities, it was held that such stock should pass rather than the will be altogether inoperative. *This case is certainly a very strong one,* but the decision appears to me to range itself under the head that '*falsa demonstratio non nocet,*' where enough appears upon the will itself to shew the intention after the false description is rejected."]

Mosley v. *Massey.*

Selwood v. *Mildmay.*

Goodtitle d. *Radford* v. *Southern.*

["The case of *Goodtitle* d. *Radford* v. *Southern,* 1 Mau. & Sel. 299, falls more closely within the principle last referred to. A devise of 'all that my farm called *Trogue's Farm,* now in the occupation of A. C.' Upon looking out for the farm devised, it is found that part of the lands which constituted *Trogue's Farm* are in the

occupation of another person. It was held that the thing devised was sufficiently ascertained by the devise of Trogue's Farm, and that the inaccurate part of the devise might be rejected as surplusage. The case of *Day* v. *Trigg*, 1 P. Wms. 286, ranges itself precisely in the same class. A devise of all 'the testator's freehold houses in Aldersgate Street, where in fact he had no freehold, but had leasehold houses there; the devise was held in substance and effect to be a devise of his *houses* there, and that as there were no freehold houses there to satisfy the description, the word 'freehold' should rather be rejected than the will be totally void. But neither of these cases affords any authority in favour of the plaintiff. They decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description, which is inaccurate, may be rejected, not that anything may be added to the will; thus following the rule laid down by Lord C. J. *Anderson*, Godbolt, 131, 'an averment to take away surplusage is good, but not to increase that which is defective in the will of the testator.'"]

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["On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a complete *blank* is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator; *Hunt* v. *Hort*, 3 Br. C. C. 311; and many other cases. Now, the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank; and it requires a very nice discrimination to distinguish between the case of a will where the description is left altogether in blank, and the present case, where there is a total omission of the estates in Clare. In the case of *Doe* d. *Oxenden* v. *Chichester*, 4 Dow. P. C. 65, it was held by the House of Lords in affirmance of the judgment below, that, in the case of a devise of 'my estate of Ashton,' no parol evidence was admissible to shew that the testator intended to pass, not only his lands in Ashton, but also in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The Lord Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says, "If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties.' Lord *Eldon*, then Lord Chancellor, had previously stated in substance the same opinion. The case so put by Lord *Eldon* and the Lord Chief Justice of the Common Pleas is the very case now under discussion. But, the case of

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Doe d. *Oxenden* v. *Chichester.*

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Newburgh v. *Newburgh.*

Newburgh v. *Newburgh*, decided in the House of Lords on the 16th of June, 1825, appears to me to be in point with the present. In that case, the appellant contended, that the omission of the word 'Gloucester,' in the will of the late Lord Newburgh, proceeded upon a mere mistake, and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life, as well in the estate in Gloucester, which was not inserted in the will, as in that in the county of Sussex, which was mentioned therein. The question, whether parol evidence was admissible to prove such mistake for the purpose of correcting the will, and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will, was submitted to the Judges, and Lord C. J. *Abbott* declared it to be the unanimous opinion of those who had heard the argument that it could not. As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue." With this opinion the Lord Chancellor concurred.]

Doe d. *Gord* v. *Needs.*
Evidence to explain ambiguity collected from the will itself.

[In the next case, *Doe* d. *Gord* v. *Needs*, 2 Mee. & W. 129, the will contained a devise to *George Gord, the son of George Gord* a devise to *George Gord, the son of John Gord*, and a devise to *George Gord, the son of Gord*, under which latter devise the lessor of the plaintiff, who was *George Gord*, the son of George Gord, claimed, offering in evidence declarations of the testator. It was held that the evidence was admissible. *Parke*, B., in delivering the judgment of the Court, said, "The only point remaining to be considered is, whether evidence was properly admitted of the devisor's declarations to shew what person he meant to designate by the description of 'George Gord, the son of Gord.' And we are of opinion, that such evidence was properly admitted. If, upon the face of the devise it had been uncertain, whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case of *ambiguitas patens* within the meaning of Lord *Bacon's* rule (Maxims, Reg. 23); which ambiguity would not be holpen by averment, for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord *Bacon*, 'to make that pass without writing, which the law appointeth shall not pass

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but by writing.' But here, in the face of the devise, no such doubt arises. There is no *blank* before the name of Gord the father which might have occasioned a doubt whether the devisor had finally fixed on any certain person in his mind. The devisor has clearly selected a particular individual as the devisee."]

["Let us consider, then, what would have been the case if there had been no mention in the will of any *other* George Gord than the son of a Gord. On that supposition, there is no doubt upon the authorities, but that evidence of the devisor's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed, in order to enable the Court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were, at the date of the will, *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord *Bacon*, of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is, that he has the manors both of North S. and South S., in which case Lord *Bacon* says, 'it shall be holpen by averment whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord *Coke* in *Altham's case*, 8 Rep. 155 a: 'if A. levies a fine to William, his son, and A. has two sons named William, the averment that '*it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine.*' Another case is put in *Counden* v. *Clarke*, Hob. 32, which is in point: 'if one devise to his son John, where he has two sons of that name;' and the same rule was acted upon in the recent case of *Doe* d. *Morgan* v. *Morgan*, 1 Cr. & M. 235. The characteristic of all these cases is, that the words of the will *do* describe the object or subject intended, and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables the Court to reject one of the subjects or objects to which the description in the will applies; and to determine *which of the two the devisor understood to be signified by the description which he used in the will.* This subject has been most ably discussed by Mr. Wigram, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills."]

["There would then have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George, the son of Gord,' had stood alone, and no mention had been made in the will of George, the son of *John* Gord, and George,

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the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of 'George, the son of Gord,' prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will has no more effect for this purpose than proof by extrinsic evidence of the existence of such persons, and *that they were known to the devisor*, would have had; it shews that there were two persons, to either of whom the description would be applicable, and that such two persons were both known: and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the will by a more full and perfect description, which excludes any other object than himself. Still, he is pointed out in the devise by a description, which, so far as it goes, is perfectly correct. In the case of *Doe* v. *Morgan*, above referred to, precisely the same circumstance occurred. We are, therefore, of opinion, that the lessor of the plaintiff is entitled to recover."]

Doe d. *Hiscocks* v. *Hiscocks.*

Evidence of *intention* inadmissible where description is partly applicable to one object and partly to another, but not exactly to either.

[In *Doe* d. *Hiscocks* v. *Hiscocks*, 5 Mee. & W. 363, the testator devised land to his son John Hiscocks for life, and after his decease devised the same land to his grandson, *John* Hiscocks, *eldest son* of the said John Hiscocks, for life, with remainder to his children in strict settlement. At the time of making the will, the testator's son J. had issue by a first marriage, Simon Hiscocks, the lessor of the plaintiff; and by a second marriage, John Hiscocks, the defendant, and other younger children. Evidence of *intention* was rejected. Lord *Abinger*, C. B., in delivering the judgment of the Court said—"It must be admitted, that it is not possible altogether to reconcile the different cases that have been decided on this subject, which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object, in all cases is, to discover the intention of the testator. The first and most obvious mode of doing this, is to read his will as he has written it, and collect his intention from his words. But, as his words refer to facts and circumstances respecting his property and family, and others whom he names, or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if

Evidence of extrinsic *facts* admissible.

these are not fully disclosed in his work, we must look for illustrations to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate, and often necessary evidence to enable us to understand the meaning and application of his words."]

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["Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will (*a*)."]

Evidence of *intention*, when admissible.

["But there is another mode of obtaining the intention of the testator, which is, by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons, (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord *Bacon* calls 'an equivocation,' *i. e.* the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shews what he meant to do, and when you know that, you immediately perceive that he has done it by the general words which he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded upon this plain ground,

(*a*) [See as to the limits of this proposition, *infra*, p. 405.]

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State of the authorities as to evidence of intention.

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that his will ought to be made in writing, and if his intention cannot be made to appear by the writing explained by circumstances, there is no will."]

["It must be owned, however, that there are decided cases, which are not to be reconciled with this distinction, in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe* d. *Le Chevalier* v. *Huthwaite*, 3 B. & Al. 632, and *Bradshaw* v. *Bradshaw*, 3 You. & C. 72, the only thing decided was, that, in a case like the present, *some* parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received (*a*). The decisions, when duly considered, amount to no more than this; that, where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to shew, that, in some secondary sense of the words, and one in which the testator meant to use them, the devise may have full effect. Thus, again, in *Cheney's case*, 5 Rep. 68, and in *Counden* v. *Clarke*, Hob. 32, the averment is taken, in order to shew which of two persons, *both equally described*, within

(*a*) [In *Doe* v. *Huthwaite* the testator devised an estate upon various limitations, with remainder "to Stokeham Huthwaite, second son of John Huthwaite, for life, with remainder to his children in strict settlement; and in default of his issue, to John Huthwaite, the *third son* of the above-mentioned John Huthwaite, for life, with remainders to his children in strict settlement." It appeared that *Stokeham Huthwaite* was the *second* son of John Huthwaite the elder, and John Huthwaite was his *third* son. The Court was of opinion that evidence of the state of the testator's family, and other circumstances, was admissible, and that upon such evidence being given, the jury might find whether he had made a *mistake* in the name of the devisee or not. The Court did not say that any evidence of intention might be admitted, but only that from *circumstances* the jury might find whether the testator had made a mistake. But evidence of a mistake is nothing less than evidence of intention; and the rule, therefore, established by this case and that of *Hiscocks* v. *Hiscocks*, seems to be that mistake may be *inferred* from extrinsic circumstances, but must not be proved by direct evidence.]

[In *Bradshaw* v. *Bradshaw* the testator devised an estate in trust for Robert B. Bradshaw, the *second* son of his daughter E. B. He devised another estate in trust for his said grandson, Robert B., for life, remainder to his first and other sons in tail, remainder to the *third, fourth, fifth*, and every other son of the said E. B. The name of the eldest son of E, B. was Robert, that of her second son was Henry, that of her third was Frank, and she never had any other sons. Evidence was admitted to shew that the testator did not know the names of his grandchildren, and had mistaken the name of the second son. Some of the evidence relied on by the Court in this case (which arose in equity) was clearly direct evidence of intention.]

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the words of the will, was intended by the testator to take the estate: and the late cases of *Doe* d. *Morgan* v. *Morgan*, 1 Cr. & M. 235, and *Doe* d. *Gord* v. *Needs*, 2 Mee. & W. 129, both, in this Court, are to the same effect. So, in the case of *Jones* v. *Newman*, 1 W. Bl. 60; according to the view the Court took of the facts, the case may be referred to the same principle as the former. The Court seems to have thought the proof equivalent only to proof of there being two J. C.'s, strangers to each other, and then the decision was right, it being a mere case of what Lord *Bacon* calls equivocation. The cases of *Price* v. *Page*, 4 Ves. 680: *Still* v. *Hoste*, 6 Madd. 192, and *Careless* v. *Careless*, 19 Ves. 604; 1 Meriv. 384, do not materially vary in principle from those last cited. They differ indeed in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in *Price* v. *Page*, a mere blank, or as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation, and in that case evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In *Selwood* v. *Mildmay*, 3 Ves. 306, evidence of instructions for the will was received. That case was doubted in *Miller* v. *Travers*, but, perhaps, having been passed by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord C. J. *Tindal*, in *Miller* v. *Travers*, be considered as being only a wrong application to the facts of a correct principle of law. Again, in *Hampshire* v. *Pierce*, 2 Ves. sen. 216, Sir *J. Strange* admitted declarations of the intention of the testatrix to be given in evidence to shew that, by the words, 'the four children of my niece Bamfield,' she meant the four children by the second marriage. It may well be doubted whether this was right (*a*); but the decision on the whole case was undoubtedly correct, for the circumstances of the family and their ages, which, no doubt, were admissible, were quite sufficient to have

Doe d. *Hiscocks* v. *Hiscocks*.

Selwood v. *Mildmay*.

Hampshire v. *Pierce*.

(*a*) [The ambiguity in *Hampshire* v. *Pierce* was clearly latent, and therefore there seems to be no reason why the evidence referred to should not be received: its admissibility, indeed, had never before been questioned. It was the dictum of Sir *J. Strange* in that case which has often been condemned, although, perhaps, that learned Judge had rather inaccurately expressed the rule in question than erred in his conception of it.]

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sustained the judgment, without the questionable evidence. And it may be further observed, that the principle with which Sir *J. Strange* is said to have commenced his judgment is much too large, and is so far inconsistent with later authorities. *Beaumont* v. *Fell*, 2 P. Wms. 141, though somewhat doubtful, can be reconciled with true principles, upon the ground that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may, perhaps, be considered to warrant that decision; but then the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received, and the same evidence was received at Nisi Prius, in *Thomas* v. *Thomas*, 6 T. R. 671, and approved on a motion for a new trial by the dicta of Lord *Kenyon* and Mr. J. *Lawrence*. But these cases seem to us at variance with the decision in *Miller* v. *Travers*, which is a decision entitled to great weight (*a*). If evidence of intention could be allowed, for the

(*a*) [The report of *Beaumont* v. *Fell* is as follows:—"One by will devised a legacy of £600 to *Catherine Earnley;* the person's name who claimed this legacy was *Gertrude Yardley*, and it was insisted by her, and admitted, that no person named Catherine Earnley claimed this legacy: but by the proof it appeared that the testator's voice, when he made his will was very low, and hardly intelligible; that the testator usually called the legatee of this £500 *Gatty*, which the scrivener who took instructions for drawing the will might easily mistake for Katy; and that the said scrivener, not well understanding who this legatee of the £500 was, or what was her name, the testator directed him to J. S. and his wife, to inform him further, who afterwards declared that Gertrude Yardley was the person intended. It was, moreover, proved that the testator, in his lifetime, had declared that he would do well for her by his will." The Master of the Rolls held, that Gertrude Yardley was entitled; although, he said, if it had been a grant, nay, a devise of land, it had been void, by reason of the mistake both of the christian and surname, and he relied on there being no Catherine Earnley to claim the legacy, and on the facts proved by the evidence. It will appear, from the recent decisions, that the only extrinsic evidence that the Court ought to have looked at was the fact that there did not appear to have been any person called Catherine Earnley. Had the evidence established that the testator was in the habit of calling the claimant Catherine Earnley, or by any name *idem sonans*, (see *Masters* v. *Masters*, 1 P. Wms. 421; *Edge* v. *Salisbury*, Ambl. 70), that might have been admitted; but the evidence only went to shew *intention*, (and that is never allowed but in a case of *ambiguity*, which this was not), and *mistake*, which is never allowed to alter a *will*, that being an instrument which is not founded on consideration, although evidence of *fraud* is admissible. See *Brown* v. *Selwin*, Cas. tem. Talb. 240; 3 Br. P. C. 607, Toml. ed.: *Earl of Newburgh* v. *Countess of Newburgh*, 5 Madd. 364: *Langston* v. *Langston*, 8 Bligh, 167.]

[In *Thomas* v. *Thomas*, the devise was—"*Item*, I give to my granddaughter *Mary Thomas*, of *Llechlloyd*, *in Merthyr parish*, the reversion of the house in Water-street, the said house to continue in the possession of my wife,

purpose of shewing that, by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Eliza Evans,

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Eliza Evans, during her widowhood." The devisor had a grand-daughter called *Ellinor Evans* (one of the lessors of the plaintiff), who lived at Llechlloyd, and a grand-daughter Mary Thomas, the only person of that name in the family, who had never been in Merthyr parish, and lived at *Green Castle*, in the parish of Llangam, some miles distant. Parol evidence was offered to prove a *mistake*, *i. e.*, to prove *intention*, and that Ellinor Evans was intended; and the evidence was admitted, as stated in the text; but at the original trial the jury gave no credit to it, and a verdict was found for the plaintiff on the several counts which were founded on the demises of the heir-at-law of the testator, on the ground that the devise was void for uncertainty; which was confirmed by the Court on a motion to enter a nonsuit. The reason given by Lord *Kenyon*, C. J., is singular:—"When the rule for a new trial was moved for, I alluded to the maxim that *falsa demonstratio non nocet*, but, in doing so, I wished that the sense of that rule should be attended to. I have always understood that such *falsa demonstratio* should be superadded to that which was sufficiently certain before: there must be *constat de personâ*, and if to that an inapt description be added, though false, it will not avoid the devise, and this gets rid of almost all the observations and arguments made by the defendant's counsel; *for in the cases cited there was no other person in competition with the person claiming.* It has been a long-established rule, that when there is a latent ambiguity in a will, the parties may go into extrinsic evidence to render that certain which without the aid of such evidence is uncertain. But here the evidence given has raised the uncertainty; if there had been no person answering the description of grand-daughter, living at Llechlloyd, in Merthyr parish, I should have rejected the description, and have said that the devise applied to Mary Thomas; but it appears that there is another person answering that part of the description, who is also an object of the testator's bounty. Then, as there are two parts of the description not answering to Mary Thomas, who is named in this clause in the will, we are left to conjecture who was meant by the devisor; but the law will not allow an heir-at-law to be disinherited by conjecture." The parol evidence disclosed the ambiguity, such as it was, and the same evidence, by the finding of the jury, proved that there was no mistake in the name of the devisee, so that the conflict of claim mentioned by the learned Judge did not exist. Ellinor Evans's claim had been disposed of, and as between the heir and the person named there was no ambiguity, it was clearly a gift to one of the two who claimed under it, and the claim of the one having been disposed of by the jury, that of the other was established by the rule *falsa demonstratio non nocet*. To support the decision, we must suppose that there was a failure of evidence as to which of the two was intended, which does not appear by the report. There seems to be no objection, upon principle, to applying both of the maxims, namely, that regarding concealed ambiguities, and that regarding inaccurate descriptions, to the same instruments, so as, when there is a description, part of which points to one person or thing, and part to another, but which describes neither accurately, to admit averments to exclude one of the two objects, and then to apply the description to the other, giving effect to that part of it which is inaccurate, and rejecting the rest as surplusage. If parol evidence is admissible to exclude one of two claimants, who is not misdescribed at all, it should not be less admissible when he does not completely fill out the description. The law, however, is clearly settled the other way, by the case in the text. *Hill* v. *Hoste*, 6 Madd. 192, which is not yet overruled, decides that

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it might surely equally be produced to prove, that, by county of Limerick a testator meant the county of Clare (*a*). Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller* v. *Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that, in this case, there must be a new trial."]

["Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the bequest void for uncertainty; but the cases of *Doe* v. *Huthwaite*, *Bradshaw* v. *Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding *facts* to be found by the jury the Court can clearly see, *with the knowledge which arises from those facts alone*, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive the declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will, indeed, for the present, succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty."]

Mr. Wigram's propositions as to the admissibility of extensive evidence to aid the inter-

[Before this part of the subject is dismissed, it will be proper to observe, that the seven propositions which Mr. Wigram has established in his luminous work on the admission of extrinsic evidence, in aid of the interpretation of wills, are applicable to deeds and

when the description applies equally well to two persons, but the name does not apply to either, evidence of *intention* is admissible. So if the name and part of the description apply to two persons, but the rest of the description to neither. *Careless* v. *Careless*, 19 Ves. 604; 1 Meriv. 384. See *Hodgson* v. *Hodgson*, 2 Vern. 593; *Andrews* v. *Dobson*, 1 Cox, 425. In *Doe Allen*, 4 Jurist, 985, evidence of *intention* was admitted to *create* an ambiguity.]

(*a*) [A difference has been insisted on between *Miller* v. *Travers*, and the two earlier cases—that, in *Miller* v. *Travers*, the will was capable of operating without resorting to the correction attempted to be made out by averment, but in the other cases it was not; and in *Thomas* v. *Thomas* the devise was actually set aside for uncertainty. But then, as Mr. Wigram suggests, (Extr. Ev. p. 163), there was really no such difference: a devise of lands in the county of Limerick, and in the city of Limerick, is the same as two separate devises of lands in those two places respectively, and the latter devise does not the less fail because the former takes effect. The true distinction between the cases is, that in *Miller* v. *Travers* the estate intended to pass was in no way pointed out, even by an imperfect description.]

other writings, *inter vivos*, as much as to wills. This is sufficiently obvious from the statement of the rules themselves, and will appear from what has been already said, and from the cases now to be referred to in connection with those propositions. A greater variety of evidence is necessarily admissible in aid of the construction of instruments *inter vivos*, on account of the greater variety of transactions to which they may relate; while, on the other hand, from the nature of the case, such instruments are less frequently expressed with ambiguity than wills; but the principles of evidence are the same, to whatever subjects they may be applied. Mr. Wigram's propositions are as follow:—

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Mr. Wigram's propositions.

pretation of wills.

I. "A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed."

Words taken in their primary meaning, when.

[This proposition, to be generally applicable, and even with reference to wills, requires to be explained in this manner:—that the strict and primary meaning here referred to, is not the most usual and popular meaning which the words bear among the generality of people, but is that meaning which correctly and technically belongs to the words with reference to the subject-matter about which they are employed, *ante*, p. 378. And words of general import must be interpreted with reference to the circumstances of the case. But if they properly bear a determinate and strict meaning, which can be satisfied by the circumstances, evidence to prove that they were habitually used by the testator, or parties to the instrument, in a looser sense, will not be admitted for the purpose of giving effect to them in that looser sense. Thus, in *Doe* d. *Oxenden* v. *Chichester*, 3 Taunt. 147; 4 Dow, 65, a testator devised his 'estate of Ashton;' and it was proved that he had an estate of which part only was situate at Ashton, but the whole of which he usually called his 'Ashton estate,' and which was so named in his steward's book; but it was held, that as there were circumstances to satisfy the meaning of the expression, construed strictly, no other meaning should be proved. See *Green* v. *Howard*, 1 Br. C. C. 31: *Doe* d. *Brown* v. *Brown*, 11 East, 441: *Doe* d. *Tyrell* v. *Lyford*, 4 Mau. & S. 55: *Robertson* v. *French*, 4 East, 135: *Smith* v. *Doe* d. *Earl of Jersey*, 2 Br. & B. 473: *Doe* d. *Beach* v. *Jersey*, 3 B. & Cr. 870: *Mounsey* v. *Blamire*, 4 Russ. 384: *Doe* d. *Preedy* v. *Holton*, 5 Nev.

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& M. 391: *Doe* d. *Gore* v. *Langton*, 2 B. & Ad. 681: *Doe* v. *Burt*, *ante*, p. 390, n.: *Colpoys* v. *Colpoys*, Jac. 464, *ante*, p. 378.]

Mr. Wigram's propositions.

II. "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

[This proposition, taken with the explanation appended to the former proposition, will be found to be consistent with the authorities cited, *ante*, p. 369, as to the admission of usage in the interpretation of contracts. See *Shelburne* v. *Lord Inchiquin*, 1 Br. C. C. 350: *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402: 2 Russ. & M. 693: *Parker* v. *Gossage*, 2 Cr., M. & R. 617: *Doe* d. *Norton* v. *Webster*, 2 B. 1840; 4 Jurist, 1010; and the cases cited in the preceding page. The doctrine of *reforming* an instrument which does not express the true intention of the parties (*ante*, p. 364) depends upon a totally different ground from that under discussion, viz. fraud;—a ground upon which wills themselves may be reformed. *Vide ante*, p. 302: *Podmore* v. *Gunning*, 7 Sim. 644; *Doe* v. *Hardy*, 1 M. & Rob. 523.]

Words taken in a secondary sense, when.

III. "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, *of which, with reference to those circumstances*, they are capable."

Obscure writing, foreign language, &c.

IV. "When the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the Court of the proper meaning of the words."

Extrinsic facts will be looked

V. "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest in-

tended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determinate the quantity of interest he has given by his will."

Mr. Wigram's propositions.

at in aid o. construction.

"The same (it is conceived) is true of every other disputed point respecting which it can be shewn that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words."]

[In commenting on this proposition, Mr. Wigram defines a *material* fact to be any fact which, *according to the ordinary rules of evidence*, tends to shew which of the propositions, II. and III., the *circumstances of the case* render applicable; in other words, whether the testator's words, being strictly construed, have or have not a definite and reasonable meaning with reference to the actual circumstances of the case. See *Eden* v. *Earl of Bute*, 7 Br. P. C. 445: *Smith* v. *Doe* d. *Earl of Jersey*, 2 Br. & B. 473: *Russell* v. *Mosely*, 6 Moore, 521: *Verlander* v. *Codd*, Turn. & R. 352: *Simpson* v. *Henderson*, M. & Mal. 300: and *ante*, pp. 368, 377.]

Evidence of intention excluded;

VI. "When the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain special cases, see Prop. VII.*) will be void for uncertainty." *Clowes* v. *Higginson*, 1 Ves. & B. 524: *Saunderson* v. *Piper*, 7 Scott, 408.]

except to explain words of *ambiguous application.*

VII. "Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, Courts of law in certain special cases admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose."

"These cases may be thus defined:—where the object of a testator's bounty or the subject of disposition, (*i. e. person* or *thing* intended), is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator."

[*Altham's case*, 8 Rep. 155 a, *ante*, p. 378, n. The whole tenor of the authorities cited in the preceding pages prove, that this and the preceding propositions are of universal application to all written in-

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struments. It may be here observed, that in a recent case, the Court of Queen's Bench held, that evidence of declarations made by a testator *subsequently* to the date of his will was admissible in proof of *intention;* there being a contest between two persons coming within the description in the will. *Doe* d. *Allen* v. *Allen,* 4 Per. & D. 220. This is contrary to the inference which Mr. Wigram has drawn from the former cases; (see p. 162). See *Whitaker* v. *Tatham,* 5 Moo. & P. 628.]

PAROL WAIVER OF A WRITTEN CONTRACT.

Agreement under seal can only be varied or waived by specialty.

Parol Variation or Waiver of an existing Contract.]—[An agreement or obligation under seal cannot be varied or abandoned by parol; but only by acceptance, after a breach, of something in satisfaction of damages; (*Heard* v. *Wadham,* 1 East, 519; 1 J. B. Moore, 371); or by matter of as high a nature; according to the rule of the civil law, which is adopted by the English law:—"*Nihil tam naturale est quam eo genere quidquid dissolvere quo colligatum est:—ideo verborum obligatio verbis tollitur: nudi consensûs obligatio contrario consensu dissolvitur.*" Dig. xvii. 33. *Blake's case,* 6 Rep. 43 b.: *Alden* v. *Blayne,* Cr. Jac. 99: *Blennerhasset* v. *Pierson,* 3 Lev. 234: *Roe* d. *Gregson* v. *Harrison,* 2 T. R. 425: *Kaye* v. *Waghorn,* 1 Taunt. 428: *Braddick* v. *Thompson,* 8 East, 344: *Thomas* v. *Courtnay,* 1 B. & Al. 1: *Sellers* v. *Beckford,* 1 J. B. Moore, 460: *Thomson* v. *Brown,* Id. 358: *Cordwent* v. *Hunt,* 2 Id. 660, overruling *Hotham* v. *E. I. Co.,* Doug. 272. But, at the common law, a writing unsealed, was not of a higher nature than words spoken, and might, therefore, be either discharged or varied by parol subsequently to its execution. *Per Cur. Goss* v. *Lord Nugent,* 2 Nev. & M. 33, *ante,* p. 349 (*a*); Stark. Evid. 1002: *Harvey* v. *Grabham,* 6 Nev. & M. 761. But a cause of action arising out of a breach of a written or oral contract can only be discharged by a release under seal, (which requires no signature, *Taunton* v. *Pepler,* 6 Madd. 166), or by the receipt of something in satisfaction of the wrong done. *Langdon* v. *Stokes,* Cr. Car. 383: Vin. Abr. *Contract,* G. 17: *Willoughby* v. *Backhouse,* 4 Dowl. & R. 539: 2 B. & Cr. 821: *Baylis* v. *Usher,* 4 Moo. & P. 791. Other acts, such as the destruction of the note or instrument evidencing the debt will, in equity, amount to a release. *Gilbert* v. *Wetherell,* 2 Sim. & St. 254.]

A simple contract may be waived or varied at common law by parol.

Cause of action how discharged.

[The Statute of Frauds declares, that no contract or agreement

(*a*) [Thus, a parol agreement to reduce the rate of interest upon a mortgage is valid, because a mortgage security is not considered as being real estate, *ante,* p. 300. See *Milton* v. *Edgeworth,* 6 Br. P. C. 580.]

concerning land shall be enforced, unless it is in writing. A parol agreement to waive or annul a previously written contract for the sale of land, is clearly an agreement concerning land within the statute; but it is an agreement of so negative a nature, that there are not many conceivable cases in which the enactment against *enforcing* such an agreement could be applicable. However, if the purchaser has paid a deposit previously to a parol waiver of the contract, it should seem, upon principle, that he cannot recover, if the defendant chooses to insist on the contract as subsisting, and offers to perform it. In *Walker* v. *Constable*, 1 Bos. & P. 306, the action was brought by a purchaser to recover back his deposit, with interest, and the costs of investigating the title, the contract having been abandoned. There was also a count for money had and received. The plaintiff, not having produced a written contract in support of his declaration, was nonsuited by *Eyre*, C. J.; and, on a rule to set aside the contract, the Court were of opinion that the contract itself must be shewn before it could be proved to have been abandoned; from which it may be inferred that they thought that an abandonment by parol might have been proved; but there seems to have been nothing to suggest that as a question. Of course, the plaintiff was entitled to recover the deposit, without interest, upon the count for money had and received. Ib. See *Adams* v. *Fairbain*, 2 Stark. 276. On the other hand, as the statute only says that such parol agreement shall not be enforced by action, there seems to be no objection to the use of a parol waiver, in answer to an action or suit for enforcing the written agreement. *Bell* v. *Howard*, 9 Mod. 302. The authorities upon these points are not quite consistent.]

PAROL WAIVER OF A WRITTEN CONTRACT.

Parol variation and waiver with reference to the Statute of Frauds.

Purchaser's remedy for his deposit after a parol abandonment of the contract.

[First, as to the parol varying of a written agreement which is within the statute. In *Jordan* v. *Sawkins*, 1 Br. C. C. 389, it was argued, that, as a written agreement for a lease might be wholly waived by parol, it might be agreed by parol that it should commence at a subsequent day to that mentioned in the writing; but Lord *Thurlow* held, that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer; and he allowed a plea of the Statute of Frauds. But he said, if the agreement had been, not to postpone the expiration of the term, but only its commencement, that would have done, because it would be no variation, but only waiving a part. 1 Ves. jun. 404. See some remarks on this case in *Robson* v. *Collins*, 7 Ves. 133, where performance of variations manifested by writing was refused, on the ground of want of consideration.]

Parol variation of a written agreement.

PAROL WAIVER OF A WRITTEN CONTRACT.

Price v. *Dyer.*

[In *Price* v. *Dyer*, 17 Ves. 356, specific performance of a written contract for a lease was granted, without reference to parol variations insisted upon by the defendant, but which had not been acted upon by him. *W. Grant*, M. R., said—"The defendant has expended nothing upon the faith of having the added stipulations performed. He has sustained no positive loss. He will only be disappointed of that advantage which he expected to receive from the gratuitous covenants of the plaintiff." See *Robinson* v. *Page*, 3 Russ. 114, where the plaintiff, offering to the defendant the benefit of parol variations, the defendant was allowed the option of having the original agreement performed with or without those variations.]

Parol variation: Cases at law.

[In a case at law, it was held, that the time limited by the written agreement for the performance of a contract for the sale of goods might be extended by parol. *Warren* v. *Stagg*, cited in *Littler* v. *Holland*, 3 T. R. 591. In *Littler* v. *Holland*, the agreement, which, it was alleged, had been varied by parol was sealed; and it was of course held, that the verbal waiver was no defence. In *Cuff* v. *Penn*, 1 Mau. & S. 21, the time for completing the delivery of goods sold under a written agreement was enlarged after acceptance of part of the goods; and it was held by Lord *Ellenborough*, C. J., to be no variation of the contract; but, if the agreement had been varied by parol, he thought, on the authority of *Meares* v. *Ansell*, 3 Wils. 275, that there would have been strong ground for the objection. See *Thresh* v. *Rake*, 1 Esp. 53. In the course of the argument in the late case of *Goss* v. *Lord Nugent*, 2 Nev. & M. 33, *Parke*, J., and *Littledale*, J., referring to these cases, observed, that they did not understand the principle upon which they proceeded, and they have since been distinctly overruled. *Infra*, p. 413.]

Goss v. *Lord Nugent.* Agreement to produce a good title cannot be varied by parol.

[In *Goss* v. *Lord Nugent*, 2 Nev. & M. 28; 5 B. & Ad. 58, land had been sold under a written contract, by which the vendor was bound to produce a good title; and in an action on the contract, the plaintiff (the vendor) insisted on a subsequent parol waiver by the defendant of that stipulation, but the evidence was held to be inadmissible. Lord *Denman*, C. J., after stating the rule at common law, (*ante*, pp. 348, 408), and the enactment of the Statute of Frauds, said—"It is to be observed, that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no actions shall be brought unless they are in writing; and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concern-

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ing the sale of lands may still be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing. It is not, however, necessary to give an opinion on that point, *as this is not a waiver and abandonment of the whole written agreement* (*a*), but only of a part of it; and the question is, what is the effect of that? It has been said by the plaintiff that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed; there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid; and that it is only an abandonment of a collateral point. But we think that the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. But in the present case the written contract is not that which is sought to be enforced; it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement, and partly by the new verbal agreement. The present contract, therefore, is not a contract entirely in writing; and as to the title being collateral to the land, the title appears to us to be a most essential part of the contract; for, if there be not a good title, the land may in some cases better not be conveyed at all. But our opinion is not framed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the Statute of Frauds, *that the contract now brought forward by the plaintiff is not wholly a contract in writing.* We do not say that verbal evidence may not be given of customs and usages applicable to the subject-matter of the written contract when the contract is silent; that has been done in a great variety of instances. Whether the plaintiff may not have relief in a Court of equity we give no opinion; it would be for the Court to decide upon the case which should be brought before them. There have, however, been some cases at law on contracts within the Statute of Frauds where verbal evidence has been allowed. *Warren* v. *Stagg,* cited in *Littler* v. *Holland,* 3 T. R. 591: *Thresh* v. *Rake,* 1 Esp. N. P. C. 53: and *Cuff* v. *Penn,* 1 Mau. & Sel. 21. These were cases where the time for the performance of the contract had been enlarged by a verbal agreement, and the decision proceeded on the ground that the original contract continued, and that it was only a

Parol enlargement of time.

(*a*) [See *Stead* v. *Dawber, contra, infra,* p. 414.]

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substitution of different days of performance. It is not necessary to say whether these cases were rightly decided. If they were so, still the present is a different case; for here, without doubt, the terms of the original contract were varied." See *Earl of Falmouth* v. *Thomas*, 1 Cr. & M. 89, *ante*, p. 296.]

[And an entire contract, within the statute, part of the subject-matter of which would not be within the statute, if it stood alone, cannot be varied as to that part by parol. (*Vide ante*, p. 300). In *Harvey* v. *Grabham*, 6 Nev. & M. 754; 5 Ad. & El. 61, by the written agreement the plaintiff was to grant a lease to the defendants, and the defendants were to take certain quantities of straw and other things at a valuation, to be made by competent persons, respectively appointed by the parties, or their umpire. The plaintiff relied upon a subsequent agreement to adopt a valuation to be made by one C. A plea that this last agreement was not in writing was held good. Lord *Denman*, C. J., said—"The original agreement was in writing, and necessarily so, for it related to an interest in lands, and being an entire agreement, the whole was necessarily in writing. (*Chater* v. *Beckett*, 7 T. R. 201, *ante*, p. 300). Now, assuming that it was competent to the parties to waive and abandon the whole of the first agreement, (which is, however, doubted in *Goss* v. *Lord Nugent*), yet here, as in that case, the parties have not waived and abandoned the whole (*a*), for it appears by the declaration that the lease is not yet granted; that the original agreement to grant it is still subsisting, and the plaintiff avers his readiness to grant it under that agreement. What has been done is a waiver and abandonment of part only, and if that part had of itself required writing within the Statute of Frauds, the cases of *Goss* v. *Lord Nugent* and *Lord Falmouth* v. *Thomas*, 1 Cr. & M. 89, are express authorities to shew that the waiver would not be binding. Here, that part might have been good of itself without writing, by reason of the acceptance which is averred in the first count, though it might have been otherwise as to the second count, which is for goods bargained and sold, not sold and delivered; and it is contended, that as it was competent to the parties to make two contracts in the first instance, one in writing as to the lease, and the other not in writing as to the straw, &c., so it was competent to them afterwards by an agreement not in writing to separate into two parts the subject-matter of the original agreement, and to substitute a new agreement not in writing

Harvey v. *Grabham*.

Parol agreement to vary mode of valuation.

(*a*) [But see *Stead* v. *Dawber*, *infra*, p. 414, *contra*.]

as to the straw, &c. We think that it is not so, and that the contract, being entire in the first instance, must so continue, and that it cannot be separated and altered otherwise than by writing. If it could, it would follow that should the present plaintiff hereafter refuse to execute the lease, the present defendant, in suing for such refusal, would be obliged to state the altered agreement as to the consideration, and aver a readiness to perform it, and would have to prove his case partly by writing and partly by oral evidence, the very predicament which the Statute of Frauds was intended to prevent." See the arguments of counsel in *Marshall* v. *Lynn*, 6 Mee. & W. 114.]

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[But, if a contract concerning land has been executed, a subsequent parol agreement concerning a matter provided for by the original contract may be made, if it does not affect the interest in the land. Thus, in *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 Marsh. 433, after a lease had been executed, a parol agreement by the lessee to pay an additional sum per annum, in consideration of improvements made by the lessee, was supported on the ground that the stipulated annual payment was not to be considered as partaking of the nature of rent. See *Price* v. *Leyburn*, Gow, 109: *Lambert* v. *Norris*, 2 M. & W. 333; *ante*, pp. 299, 310: and *infra*, Vol. 4, p. 327.]

Collateral agreement after the original contract has been executed.

[In the next case upon the subject, *Stowell* v. *Robinson*, 5 Scott, 196, it was held, that a written contract for the sale of a leasehold public-house, in which was a stipulation for delivery of possession on a certain day, could not be varied by a subsequent parol agreement for delivery of possession on a later day. The parol waiver was set up by the defendant, who was the vendor. *Tindal*, C. J., in delivering the judgment of the Court, said that the question was —"Can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? We are of opinion that it cannot. This is an agreement for the sale of land, upon which, by the Statute of Frauds, sect. 4, no action can be brought, unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorised. Now, we cannot get over the difficulty which has been pressed upon us, that, to allow the substitution of a new stipulation as to the time for completing the contract, by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement, signed by the parties, is virtually and substantially to allow an action to be

Stowell v. *Robinson.*

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brought on an agreement relating to the sale of land, partly in writing, signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds. Such was the opinion expressed by Lord Chancellor *Hardwicke*, in *Parteriche* v. *Powlett*, 2 Atk. 383; and by Sir *W. Grant*, M. R., in *Price* v. *Dyer*, 17 Ves. 356: and we think the reasoning upon which the judgment of the Court of King's Bench proceeds in *Goss* v. *Lord Nugent* goes directly to the point, that the evidence now under discussion is inadmissible." See, however, the next case.]

Time of delivery an essential part of contract for sale of goods of a fluctuating value.

[In *Stead* v. *Dawber*, 2 Per. & D. 447; 10 Ad. & El. 57, the plaintiff stated a written contract for the sale of goods to him, to be delivered on the 22nd of May, and that the plaintiff afterwards, at the request of the defendants, gave them time for delivery until the 24th of May, assigning for breach non-delivery on the 24th. The defendants pleaded, that the extension of the time for delivery formed part of a contract between the plaintiff and defendants for the sale of goods for the price of upwards of 10*l.*; that the plaintiff did not accept any part of the goods, nor give any thing in earnest; and that no note or memorandum in writing of the bargain was signed by the defendants, or either of them, or by their agent. Replication, that the said giving of time, &c., was not part of the contract for the sale of the goods; and issue joined. The defendants succeeded upon this plea; the Court holding, that the parties had substituted a new contract for the old one—the same as the old one in all respects, except as to the day of delivery and the date of the accepted bill, (which depended on the time of delivery). Lord *Denman*, C. J., said—" Where the variation is so slight as in the present case, and the consequences so serious, the mind comes reluctantly to this conclusion; and this reluctance is increased by considering in how many instances of written contracts, within the Statute of Frauds, slight variations are made at the request of one or other of the parties, without the least idea at the time of defeating the legal remedy or the original contract. But the same principle must be applied to the variation of a day, a week, or a month; and it seems impossible to suppose, that, where the plaintiff had agreed to substitute the 24th for the 22nd, either party imagined that an action would be brought for a non-delivery on the 22nd, or that a delivery on the 24th would not be a legal performance of the contract existing between them. It was urged by plaintiff's counsel, that the defendant's argument reduced him to an inconsistency; that he alleged, on the one hand, an alteration of the contract by parol, and

Parol variation of a written contract held to be a total abandonment of it.

PAROL WAIVER OF A WRITTEN CONTRACT.

Stead v. *Dawber.*

yet, on the other, asserted, that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract, not under seal, by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties (*a*), but the law intervenes, and in the case of such a contract takes away the remedy by action (*a*). It cannot be said, that the time of delivery was not originally of the essence of this contract. The evidence shews, that the value of the article was fluctuating, and the time of payment was to be calculated from the time of delivery. Where these circumstances exist, it cannot in strict reasoning be argued, as was said by Lord *Ellenborough* in the case of *Cuff* v. *Penn*, 1 Mau. & S. 21, 'that the contract remained, although there was an agreed substitution of other days than those originally specified for its performance;' nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days, for the same consideration which existed for the old agreement is imported into the new agreement which is substituted for it."]

Remarks on *Stead* v. *Dawber.*

[The concluding remark in the above judgment does not seem to remove the objection against which it is addressed. The question was, not as to the validity of the new agreement, which it was admitted could not be enforced, but as to the waiver of the original agreement; and for that, no consideration imported into the void agreement that was substituted could be alleged. Where parties agree simply to abandon an agreement, the mutual consideration for such contract of abandonment is, the mutual release of obligation; and where it is agreed by writing, that an agreement shall be abandoned, and a new one substituted, the consideration for the waiver is the new agreement; and the contemplated consideration would be the same if the substitution of the new agreement were by parol. But then the question would be, whether, as such new agreement could not be enforced, it could be insisted on as a valid con-

(*a*) [There seems to be in this remark some confusion between the 4th and the 17th sections, which are very differently worded. The 17th section, by which the case in the text was governed, enacts, that no contract for the sale of goods, &c., "*shall be allowed to be good,*" unless, &c. This appears to avoid the contract altogether, but the 4th section only takes away the remedy. *Vide ante*, pp. 283, 317. But the point was not at all material in either view, to the question before the Court in *Stead* v. *Dawber.*]

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sideration; and this view of the case seems to furnish an answer to the argument for the defendant in the above case. See *Price* v. *Dyer, ante,* p. 410; *Jackson* v. *Galloway,* 6 Scott, 792.]

Marshall v. *Lynn.*

Contract required to be in writing by the statute cannot be varied by parol.

No part of a written contract considered to be immaterial at law.

[In *Marshall* v. *Lynn,* 6 Mee. & W. 109, the point was decided generally on the authority of *Stead* v. *Dawber,* that the time for performing a written contract within the 17th section of the Statute of Frauds, if mentioned in the writing, cannot be afterwards varied without writing. *Parke,* B., said—"It seems to me to be unnecessary to inquire, what are the *essential* parts of the contract and what not; and that *every* part of the contract in regard to which the parties are stipulating, must be taken to be material; and, perhaps, therefore, the latter part of the judgment in *Stead* v. *Dawber* may be considered as laying down too limited a rule. Every thing for which the parties stipulate, as forming part of the contract, must be deemed to be material."]

Forfeiture may be waived by parol or by conduct.

[In *Carpenter* v. *Blandford,* 2 Man. & Ry. 93; 8 B. & Cr. 575, by the agreement the deposit was to be forfeited if the purchaser did not complete his side of the agreement, part of which was for an appraisement of stock in trade on a certain day; and the plaintiff, (the vendor), having been informed that the defendant could not complete the appraisement until the following day, and not having objected at the time, it was held, that he could not on the following day object and claim the forfeiture; but that the plaintiff might recover his deposit. The Court said, that a forfeiture was *strictissimi juris,* and the defendant must shew that he had done every thing which he was bound to do, to entitle him to insist on the forfeiture, and that he had not done any thing to waive that right. The nature of the stipulation in this case seems to distinguish it from those which have been previously cited. *Vide infra,* Vol. 4, pp. 378, 380.]

[The well-known rule in equity is, to consider stipulations as to time binding or not, according to the subject-matter and the nature of the contract and the conduct of the parties. See Sugd. Vend. Ch. 5.]

Parol variation partly acted upon may be enforced.

[If the parol variation has been acted upon by either party, so that to allow the other to insist on the original contract would be to sanction a fraud, the principle discussed *ante,* p. 355, comes into operation, and specific performance of the contract, as varied, may be enforced in equity. Thus, in an *Anonymous case* in Viner, (*Contract,* H. 37), W. leased a house to N. for eleven years, and by the

written agreement was to allow £20 to be laid out in repairs; N. repaired the house, and finding it to take a much greater sum than £20, offered to W. to go on, and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen or as many as N. should think fit. W. replied that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning any certain term. The Master of the Rolls said, that, before the statute, written agreements could not be controlled by a [contemporaneous] parol agreement contrary to it, or altering it; but this was a new agreement, and the laying out the money was a performance on one part, and ought to be carried into execution: and he built his decree upon two cases; first, where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and after differing on the terms of the lease, the lessor brought a bill, and the lessee insisted on the Statute of Frauds; the Lord Keeper dismissed the bill, but the plaintiff was relieved in Dom. Proc.; and the second was a case in Lord *Jefferies'* time.]

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[So, in *Legal* v. *Miller*, 2 Ves. sen. 299, the written agreement being that that the lessor should repair, and it being found that it would be better to pull the house down entirely, though more expensive to the owner, it was agreed by parol that that should be done, the tenant paying an additional rent. This was allowed to be a good defence to a bill by the tenant for a specific performance according to the written agreement. See *Earl of Anglesey* v. *Annesley*, 4 Br. P. C. 421: *Price* v. *Dyer*, 17 Ves. 364. And, in *Van* v. *Corpe*, 3 Myl. & K. 269, in answer to a bill seeking specific performance of an agreement for a lease, the defendants set up a subsequent parol agreement, that, in consideration of certain alterations being made in the premises by the defendants, the plaintiff would execute a lease containing a covenant against carrying on certain trades, which was not provided for by the written agreement; and Sir *J. Leach*, M. R., held, that if that were proved, being made upon valuable consideration, the plaintiff would be bound by it as well as the defendants.]

Legal v. *Miller*.

Van v. *Corpe*.

[Lastly, as to the total abandonment by parol of a contract within the Statute of Frauds. In *Backhouse* v. *Crosby*, 2 Eq. Ab. 32; 3 Swan. 434, the evidence of an alleged parol waiver of an agreement for the purchase of land was considered inconclusive; and the Lord Chancellor said, that he would not say that a contract in writing

Whether a contract within the statute may be abandoned by parol.

Backhouse v. *Crosby*.

PAROL WAIVER OF A WRITTEN CONTRACT.

could not be waived by parol, yet he should expect in such a case a very clear proof; and the proof in the present case he thought very insufficient to discharge a contract in writing; and observed, that the Statute of Frauds requires that all contracts and agreements concerning land should be in writing (*a*). Now, an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract. However, there was no occasion then to determine that point. In *Goman* v. *Salisbury*, 1 Vern. 240, a bill to have a written agreement executed in specie was dismissed, on the ground of a subsequent parol discharge. See *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 576: *Inge* v. *Leppingwell*, 2 Dick. 469: *Robson* v. *Collins*, 7 Ves. 130. Lord C. B. *Eyre*, in *Davis* v. *Symons*, 1 Cox, 406, said—"That certainly a waiver of a contract concerning lands may be by parol; the waiver is in its own nature subsequent to, and necessarily collateral to the agreement, and therefore can never bear any relation to the rule of evidence excluding parol contemporaneous variations of a writing. There might, indeed, have been another rule, that a written instrument shall not be waived by parol; but, in fact, Courts of equity do not consider themselves as bound by any such rule; and it is now clear that a written agreement may be waived." In *Price* v. *Dyer*, 17 Ves. 363, Sir *W. Grant*, M. R., said, that, as at present advised, he inclined to think that a parol waiver, clearly and satisfactorily proved, would be a ground for refusing to enforce performance of a written contract respecting lands. And this dictum was recognised by Sir *J. S. Copley*, M. R., in the case of *Robinson* v. *Page*, 3 Russ. 119, who observed, that, undoubtedly, waiver even by parol would be a sufficient answer to a bill asking performance of a written contract. But it had been laid down in all the cases, that such a defence must be established with clearness and precision, and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into.]

Goman v. *Salisbury*.

Davis v. *Symonds*.

Price v. *Dyer*.

Robinson v. *Page*.

Parol waiver at law.

[The decision in *Stead* v. *Dawber* (*ante*, p. 414), recognised in the subsequent case of *Marshall* v. *Lynn*, (*ante*, p. 416), goes the full length of deciding, not only that a written contract within the Statute of Frauds may be waived by parol, but that (contrary to the dicta of Lord *Denman*, C. J., in *Goss* v. *Lord Nugent*, *ante*,

(*a*) [It has been already remarked in several places, that the words of the fourth section of the statute are by no means so extensive as they are here stated to be. *Ante*, pp. 283, 317, 362, 409.]

p. 411, and in *Harvey* v. *Grabham, ante*, p. 412), a parol agreement to vary any of its terms amounts to a total waiver. In that case the parol agreement was stated by the plaintiff himself, and admitted by the defendant at the same time that he took advantage of it to get rid of the contract altogether; but the principle of the decision seems to be equally applicable to a parol variation, which is not stated or admitted by the party against whom it is used. However, in *Stowell* v. *Robinson*, 5 Scott, 196, *ante*, p. 413, the plaintiff recovered, as we have seen, notwithstanding a parol variation stated by the defendant, and admitted on the other side.]

PAROL WAIVER OF A WRITTEN CONTRACT.

AGREEMENTS.

PRECEDENTS.

1. FOR LETTING OF FURNISHED LODGINGS OR HOUSE.

1. AGREEMENT *for the Letting of* FURNISHED LODGINGS *or a* FURNISHED HOUSE.

ARTICLES OF AGREEMENT (*a*) made and entered into the —— day of ——, 18—, BETWEEN [*landlord*], of &c., of the one part; and [*tenant*], of &c., of the other part.

Parties.

Agreement.

THE said [*landlord*] lets, and the said [*tenant*] takes, ALL THAT (*b*) the ground-floor and the two front attics, with the back coal-cellar, of the dwelling-house of the said [*landlord*], situate in —— street, in the parish of ——, &c. together with the use of the front kitchen and the back yard, with the appurtenances, in common with the occupier for the time being of the other part of the said dwelling-house (*c*); toge-

Parcels;

with furniture, &c. in schedule.

(*a*) [Although this instrument is denominated an agreement, yet it operates as an actual devise, and would not be admissible in evidence unless stamped as such. *Vide infra*, Vol. 4, pp. 265, 551, 553: and *Brashier* v. *Jackson*, 6 Mee. & W. 549: *Chapman* v. *Towner*, 6 Mee. & W. 100.]

(*b*) If the agreement be for a ready furnished house, &c., say,

FURNISHED HOUSE.

"ALL THAT messuage or dwelling-house, with the coach-house, stable, out-houses, and garden behind the same, with the appurtenances, situate in —— street, in the parish of ——, in the said county of ——, and late in the occupation of ——; together with the fixtures, &c.

(*c*) If it be in the agreement, add,

For a surgeon,

"*and* liberty to put the name and profession of the said

1. FOR LETTING OF FURNISHED LODGINGS OR HOUSE.

ther with the fixtures, furniture, utensils, and things, particularly mentioned in the schedule hereunder written, FOR (*d*) the term of —— months, commencing from the —— day of ——, 18—; AT the rent of £—— for every calendar month, to be paid at the end of every such month, and the first payment thereof to be made on the —— day of ——, 18—; AND the said parties do hereby, for themselves, their respective heirs (*e*), executors, administrators, and assigns, further agree, that the said [*tenant*] shall and may, from and after the expiration of the said term of —— months, hold and enjoy the said ground-floor, rooms, furniture, and premises from [*six*] months to [*six*] months at the said rent, until one of the said parties shall give unto the other, in writing, [*three*] calendar months' notice to quit; at the end of which term of —— months, or the expiration of any such notice as aforesaid, the said [*tenant*], his executors, administrators, or assigns, will and shall leave the said premises and the said fixtures, furniture, utensils, and things, in as good state and condition as the same now are, reasonable wear and tear excepted; *And also*, will and shall replace such part of the glass, china, and earthenware as shall be broken, with other articles of the same pattern and of equal value (*f*); *And* that the said [*landlord*], his heirs, executors, administrators, or assigns, will or shall during the said term or time keep the said premises and furniture in good repair and condition, and replace such part of the said fixtures and furniture as

Term.
Rent.

Tenant to hold for a like term until notice by one of the parties.

After notice, tenant to quit and leave the furniture, &c. in good condition,

and to replace broken glass, &c.

Landlord to repair premises and furniture.

[*lessee*] on the front door of the said dwelling-house, in such characters, manner, and form as he shall think proper; *and also*, to place and fix a bell with wires extending to either of the said front attics, with the words 'night bell' affixed near the handle, on the outside of the door of the said dwelling-house;"

&c. liberty to put name on door, and to fix a bell.

(*d*) If by the week, say,

"for —— weeks, to commence from the —— day of —— now next, at £—— per week, to be paid weekly;"

BY THE WEEK.

(*e*) [The word "heirs" may be omitted as useless in every agreement that is not sealed.]

(*f*) Sometimes in agreements for ready furnished lodgings, or a ready furnished house, the following is inserted:—

"AND *also*, that the said [*landlord*] shall have power to distrain for the said rent upon any of the goods and chat-

Schedule.

1. FOR LETTING OF FURNISHED LODGINGS OR HOUSE.

shall by reasonable wear and tear be rendered unfit for use. As WITNESS their hands.

THE SCHEDULE TO WHICH THE ABOVE WRITTEN AGREEMENT REFERS.

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tels of the said [*tenant*], as often as such rent shall be —— days in arrear."

Landlord may distrain the goods of tenant of ready furnished lodgings.

But this clause seems to be perfectly useless, as a landlord may distrain the goods of a tenant of ready furnished lodgings for rent in arrear; *Newman* v. *Anderton*, 2 New Rep. 224; and indeed it seems strange how it could ever have been conceived that the remedy by distress should be lost on account of the value of the property being enhanced by the addition of a looking-glass or some other such personal chattels. In London and other towns, it scarcely ever happens that any house is let without some goods being let with it, but only one rent is reserved: and with a brewhouse it is common to let the utensils; but it never was doubted that the landlord might distrain for the rent. *Vide Spencer's case*, 5 Co. 17 a. 3, [and *infra*, Vol. 4, pp. 548, 550, 556.]

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2. FOR A LEASE OF HOUSE AND FURNITURE.

2. AGREEMENT *for a* LEASE *or* UNDER-LEASE *of a Private House, with or without the Furniture; or of a Public House* (*a*).

Parties.

ARTICLES OF AGREEMENT made and entered into the —— day of ——, 18—, BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part.

Agreement to lease.

THE said [*lessor*] *doth* hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*lessee*], his executors, and administrators, that he, the said [*lessor*], his (*b*) heirs or assigns, will or shall, within the

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(*a*) [J. The danger and impolicy of letting tenants into possession under agreements of this nature, has been elsewhere pointed out, *vide post*, Vol. 4, p. 265. As soon as the terms are settled, and before the tenant enters, a lease should be executed, which, if the property is small, may be deposited in the hands of a third person, to avoid the expense of a counterpart. J.]

UNDER-LEASE.

(*b*) If the lessor has only a term for years in the premises, say, "his executors, administrators, or assigns,"

2. FOR A LEASE OF HOUSE AND FURNITURE.

space of —— months now next ensuing, or when thereunto required by the said [*lessee*], his executors or administrators, well and effectually, by indenture, demise and lease unto the said [*lessee*], his executors and administrators, ALL THAT messuage, tenement, or dwelling-house, with the coach-house, stables, and garden behind the same, situate, &c., with the appurtenances thereunto respectively belonging (*c*), TO HOLD the same unto the said [*lessee*], his executors and administrators henceforth [*or* from the —— day of ——, 18—] for the term of —— years, AT the yearly rent of £——, to be payable quarterly, clear of all taxes, rates, and assessments whatsoever, except the land-tax, the first payment thereof to be made on the —— day of ——, 18—; *and also*, a proportional sum for the period, if any, which may happen to elapse between any quarterly day of payment and the period of the determination of the said term, if the same shall be determined under the proviso for re-entry hereinafter mentioned (*d*). AND IT IS HEREBY AGREED by and between the said parties hereto, that in such indenture of lease shall be contained covenants on the part and behalf of the said [*lessee*], his heirs, executors, and administrators, to pay the said yearly rent accordingly; *And also*, to bear and pay the rates or assessments which shall be made in respect of the said premises, during the said term, for cleansing and keeping in repair the common sewer or drain for carrying off the water in —— street (*or* parish) aforesaid; *And also*, to keep the messuage, tenement or dwelling-house, and premises, intended to be leased (*e*) during the said term, in as good plight and condition as the same are now in, and so to deliver up the same, together with the

Parcels.

Term.

Rent.

Covenants by the lessee.

To pay rent.

To pay sewer's rate.

To repair.

To deliver up at end of term.

(*c*) If furniture be leased with the house, say,

FURNITURE.

"*together* also with the use of all and singular the furniture in and belonging to the said messuage, tenement, or dwelling-house mentioned and comprised in the schedule or inventory hereunder written (*or* hereon indorsed, *or* hereunto annexed), and signed by the said parties hereto."

Reference to schedule.

(*d*) *Vide infra*, Vol. 4, p. 526.

(*e*) If furniture be leased with the house, say,

Furniture.

"*and also*, the furniture mentioned and comprised in the schedule or inventory hereunto annexed (reasonable wear and tear excepted),"

2. FOR A LEASE OF HOUSE AND FURNITURE.

several fixtures to the premises belonging, at the end or other determination of the said term, reasonable use and wearing thereof only excepted; *And also*, not at any time or times during the said term to remove, or cause or suffer to be removed from or out of the said messuage, tenement, dwelling-house and premises, any of the said (*f*) fixtures on any account whatsoever: *And also*, not to assign or underlet the said premises, or any part thereof, to any person or persons whomsoever, without the consent of the said [*lessor*], his heirs or assigns, first had and obtained in writing for that purpose (*g*); or use or exercise, or permit or suffer to be used or exercised, the trade or business of a tavern-keeper, victualler, retailer of spirituous liquors, eating-house-keeper, oyster-seller, retailer of prepared coffee, tea, and other provisions, commonly called a coffee-house-keeper, butcher, currier, soap-boiler, common brewer, distiller, tallow-chandler, tallow-melter, sugar-baker, working-brazier, tinman, plumber, tripe-boiler or seller, dyer, smith, farrier, pipe maker or burner, caricature or printseller, or newsman, or any other noisome or offensive trade or business whatsoever, in or upon the said premises or any part thereof; *And also*, a proviso for re-entry on the said premises on non-payment of the said yearly rent by the space of twenty-one days next after the same shall become due, or on non-performance of

Not to remove fixtures.

Not to assign lease, or underlet without consent.

Not to exercise offensive trades.

Power of re-entry.

Not to remove furniture.

(*f*) "furniture or"

LEASE OF A PUBLIC HOUSE.

(*g*) If it be a *lease of a public-house* by a brewer, substitute in the room of the succeeding provision, the following:

Not to be made a private house.

"*And* not to permit or suffer the said dwelling-house to be converted into a private house or shop, without the consent, in writing, of the said [*lessor*], his heirs or assigns; *And* to keep, conduct, and manage the said house in such orderly, proper, and regular manner, that the license or certificate of the magistrates may not be taken away or refused to be renewed; *And also*, to take, have, and purchase from the said [*lessor*], his heirs or assigns, and from no other person, all the table-beer, porter, beer, ale, wine, brandy, rum, gin, shrub, and all other liquors and cordials which the said [*lessee*], his executors, administrators, or assigns shall sell in or upon the said premises:"*

To keep orderly house.

To purchase beer, spirits, &c. of lessor.

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* [As to these clauses, *vide post*, Vol. 4, pp. 416, 418, 515, 786.]

any of the covenants to be contained in the said lease, on the lessee's part to be performed) (*h*); *And* all (*i*) other usual and reasonable covenants; *And* that there shall also be contained in the said lease a covenant on the part of the said [*lessor*], his heirs, executors, and administrators, for quiet enjoyment of the said premises by the said [*lessee*], his executors and administrators, during the said term, upon payment of the said yearly rent, and performance and observance of the covenants to be contained in such lease on his or their parts to be performed and kept (*k*). AND THE SAID [*lessee*] for himself, his heirs, executors, and administrators, doth hereby cove-

2. FOR A LEASE OF HOUSE AND FURNITURE.

and other usual covenants.

Lessor to covenant for quiet enjoyment.

Lessee cove-

(*h*) If the agreement be that the rent shall be suspended or abated in case of fire, &c. say,

Rent to be suspended or abated in case of fire, &c.

"*And also*, a proviso for the suspension or abatement of the said rent during such time as the said premises, or any part thereof, shall remain useless, by reason of fire, storm, or tempest, the same to be referred to arbitration, or arbitration and umpirage, if any dispute should arise respecting the time or proportion of such suspension or abatement;"

"*And also*, a covenant on the part of the [*lessor*], his heirs or assigns, to rebuild or repair, in a proper and workmanlike manner, as soon as conveniently may be, such part of the said premises as shall be damaged or destroyed by fire, storm, or tempest: *And it is also agreed*, that if the said premises shall be destroyed, damaged, or injured by fire, or otherwise, before the commencement of the said term, this agreement shall nevertheless continue in force, and be carried into execution in the same manner as if such event had not taken place;"

Lessor to rebuild in case of fire, &c.

Agreement to continue in force notwithstanding fire, &c. before commencement of term.

(*i*) If the lessor has only a term for years, say,

UNDER-LEASE.

"such other covenants (except the covenant for building), as are contained on the part of the lessee in the indenture of lease under which the said [*lessor*] holds the said premises; *And also*, all"

Such covenants as are in original lease.

(*k*) If it be for a *lease of a public house*, add,

LEASE OF A PUBLIC HOUSE.

"*And also*, a covenant that the said [*lessor*], his heirs or assigns, will or shall during the said term serve, provide, and send unto the said [*lessee*], his executors, administrators, and assigns, such good and palatable table-beer, porter, beer, ale, wine, brandy, rum, gin, shrub, and all other

Brewer to provide good beer, &c.

2. FOR A LEASE OF HOUSE AND FURNITURE.

nants to accept lease, and pay the law charges,

nant and agree with the said [*lessor*], his heirs and assigns, that he the said [*lessee*], his executors or administrators, will or shall accept such lease as aforesaid, upon the terms and conditions above specified, and execute a counterpart thereof; *and also*, will or shall bear and pay the expense of these presents (and of a counterpart hereof), and of such lease and a counterpart thereof (*l*), and employ such person as the said [*lessor*], his (*m*) heirs or assigns, shall direct to prepare the same. *Lastly*, it is hereby agreed, that this agreement shall

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and change bad beer, &c.

liquors and cordials, at such and the same price and prices, and of such sort, quality, and description, according to the price, as the said [*lessor*], his heirs or assigns, shall usually and accustomably provide for and deliver to his or their other publicans, customers, or dealers; *and also*, that the said [*lessor*], his heirs or assigns, will or shall, within (*ten*) days after notice for that purpose, remove and take away such of the said malt liquors, wines, spirits, and all other liquors and cordials as shall be or become unfit for sale or consumption, in consequence of the bad quality thereof, and replace the same with others of a good and vendible quality; and in default thereof, shall forfeit and pay unto the said [*lessee*], his executors, administrators, or assigns, the sum of ——pounds for every such default; *and also*, a proviso that the said [*lessor*], his heirs or assigns, shall not be obliged or compelled to supply the said [*lessee*], his executors, administrators, or assigns, with any of the said malt liquors, wines, spirits, or other liquors or cordials, after such time as the said [*lessee*], his executors, administrators, or assigns shall have contracted a debt with the said [*lessor*], his heirs, or assigns, to the amount of —— pounds, for any such malt liquors, wines, spirits, or other liquors or cordials as aforesaid, until the same debt shall be fully paid and satisfied (or reduced under that amount)."

Penalty on default.

Brewer not to be bound to supply beer, &c. while a debt to the amount of £— is due.

Arbitration clause.

It may be often prudent, in an agreement for a lease of a public house, to add the usual arbitration clause, "in case of any dispute between the lessor and lessee, either as to the quality of the spirits, &c., supplied, or any other matters or things connected with the agreement." *Vide* general arbitration clauses, *post*, Vol. 4, pp. 655, 748.]

(*l*) [As to this *vide infra*, Vol. 4, p. 566.]

(*m*) If the lessor has only a term for years on the premises, say, "his executors, administrators, or assigns,"

not, nor shall anything herein contained operate or be deemed to operate as an actual or present demise of the said premises, or to give to the said [*lessee*] any legal estate or interest therein, until the lease hereby provided for shall be actually executed. IN WITNESS, &c. 2. FOR A LEASE OF HOUSE AND FURNITURE.

THE SCHEDULE OR INVENTORY ABOVE REFERRED TO, (*or* TO WHICH THE WITHIN-WRITTEN AGREEMENT REFERS, (*or* TO WHICH THE AGREEMENT HERETO ANNEXED REFERS). Schedule.

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3. AGREEMENT *by the Owner of the* FEE-SIMPLE; *or by a* TENANT IN TAIL (*a*); *or by a* TENANT FOR LIFE *or in Tail, under a* POWER; *or by a* HUSBAND *and* WIFE *seised in right of the Wife; or by the* STEWARD *or* BAILIFF *of the Lessor, for a* LEASE OF A FARM, *for Twenty-one Years, determinable at the End of the first Seven or Fourteen Years.* 3. FOR A LEASE OF A FARM.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, in the year of our Lord ——, BETWEEN [*lessor*] (*b*), of &c. (*c*), of the one part; and [*lessee*], of &c. of the other part.

(*a*) [As to leases and agreements by tenants in tail, &c., *vide infra*, Vol. 4, pp. 238, 239, &c.]

(*b*) If by husband and wife seised in right of the wife*, say, "and [*wife*], his wife," By husband and wife.

(*c*) If by the steward or bailiff of the lessor, say, "[*the lessor*] of &c., by [A. B.] of &c., his steward or bailiff lawfully authorised† for this purpose," Steward, &c.

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* An agreement for a lease by a husband and wife seised in right of the wife would not be binding on the wife or her heirs, or her issue in tail, because the statute 32 Hen. 8, c. 28, only authorises "leases;" and if Of legal estate.

† Though the contract itself must, by the Statute of Frauds, be in writing, *an authority* to buy or treat as agent for another may be good and effectual without any writing. *Ante*, p. 321. Authority to agent to contract.

3. FOR A LEASE OF A FARM.

Consideration.

Agreement.

FIRST, the said [*lessor*], in consideration of the rents and covenants hereinafter agreed to be respectively paid and performed, doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessee*], his executors and administrators, that he the said [*lessor*], *his* (*d*) heirs or assigns, will or shall, on or before the —— day of —— now next (*e*), grant and execute to the

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Husband and wife.

(*d*) If by husband and wife,
"And [*wife*], his wife, her"

Under a power.

(*e*) If by tenant for life, &c. under a power—
"and by virtue and in exercise of the power contained in his marriage settlement (*or* his father's will, *or* in an indenture bearing date on or about the —— day of ——, 18—, and made between, &c.)"

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if the circumstances required by the statute are not observed, as those leases are innovations upon the common law, and are sanctioned only by that act of Parliament under certain terms and conditions, a Court of equity has no jurisdiction to supply the omission. Cowp. 267; *Anon.* 2 Freem. 224; 1 Scho. & Lef. 71; 1 Rop. Husb. and Wife, 95.

Of equitable estate.

So, when a married woman is entitled to an equitable freehold interest, not settled to her separate use, it is necessary that she should concur with her husband in executing a conveyance to be duly acknowledged pursuant to the statute 3 & 4 Will. 4, c. 74, in order to pass the estate, or to enable them to make other leases than the statutes allow husband and wife to make of her legal estates. [J. And it is to be observed, that an agreement to grant a lease would not become obligatory upon or enforceable against a married woman by her being made to assent to, or by her acknowledging the instrument. J.] *Vide* 1 Sand. Uses, 274, 3d ed.

Attorney should act in the name of his principal.

When a person has authority, as attorney, to do any act, he ought to do it in the name of the person who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority; *Combes' case*, 9 Co. 76 b.: *White* v. *Cuyler*, 6 T. R. 177: [*Barford* v. *Stukey*, 2 Br. & B. 333]; but it is immaterial whether the attorney place his own name first or last. Therefore an execution thus, "for J. B. (the principal), M. W. (the attorney), (L.S.)," is valid. *Wilks* v. *Back*, 2 East, 142. So where an attorney enters into an agreement on behalf of his principal, the agreement should be made and signed in the name of the principal by him, as attorney; for if an attorney covenant in his *own* name for *himself*, *his heirs*, &c. he will himself be personally bound, though he be described in the instrument as covenanting for and on the part of his principal. *Appleton* v. *Binks*, 5 East, 148: *Kendray* v. *Hodgson*, 5 Esp. Ca. 228. *Vide infra*, Vol. 4, p. 256.

Where

3. FOR A LEASE OF A FARM.

said [*lessee*], his executors, administrators, and assigns, a valid and effectual lease in the law of ALL THOSE, &c., which premises are more particularly mentioned and described in the schedule to these presents, TO HOLD such part of the tillage ground as is now in wheat or wheat stubble, from the 13th day of February now next; the pasture ground from the 5th day of April next, and the residue of the said premises from the 12th day of May next, for the term of twenty-one years from the said days respectively, determinable by either party (*or* by the lessee) at the end of the first seven or fourteen years, on giving one year's previous notice in writing, AT the yearly rent of £——; AND AT the additional yearly rent of £—— for every acre of meadow or pasture land, which the said [*lessee*], his executors, administrators, or assigns, shall break up or convert into tillage, and so in proportion for less than an acre: the said rents to be paid quarterly (*f*); and the first quarterly payment of the said rent of £—— to be made on the —— day of —— now next, and the first quarterly payment of the said additional rent to be made on the first of the said days which shall happen next after such breaking up or converting into tillage, and thence to be respectively continued, free from all taxes, rates, assessments, and deductions whatsoever (the land-tax and the yearly rent of £——, payable to the lord of the manor only excepted, and which it is hereby agreed shall be paid by the said [*lessor*], his heirs and assigns); and a proportional sum to be paid for the period, (if any), which may elapse between any one of the said days of payment and the determination of the said term under the

Parties.

Term and time of entry.

Rent.

Additional rent.

(*f*) "except the last quarter's rent, which it is hereby agreed shall be paid on the 25th day of March, before the expiration of the said term;"

Last quarter's rent to be paid before expiration of term.

[As to reserving rent in advance, see Vol. 4, pp. 330, 332, 644.]

Where a man has only a particular power or authority to make leases for life or years, he cannot make leases by force of his power by letter of attorney, because he has only a particular power which is personal to him. *Lady Gresham's case*, cited 9 Co. 76 a. *Combes's case*. *Delegatus non potest delegare*, 1 Bac. Abr. 320, Gwil. ed. *Authority* (*e*). Although perhaps in equity, for the reasons stated *infra*, Vol. 4, p. 257, an agreement for a lease entered into by the authorised agent of a person having only a power to make leases would be binding on the remainder-man; as of course it would bind the donee himself for his time.

At law a power cannot be executed by attorney.

3. FOR A LEASE OF A FARM.

proviso hereinafter mentioned, such sum to be payable immediately upon such determination (*g*). *Which* indenture of lease, and a counterpart thereof, are to be forthwith prepared by the solicitor of the said [*lessor*], at the costs and charges of the said [*lessee*]; and are to contain the several covenants, clauses, provisoes, agreements, and restrictions, usually reserved and contained in leases of farms in the neighbourhood (*h*); (*or*, in the indenture of lease dated the —— day of —— 18—, whereby —— now holds the said farms and lands); *And also*, the following covenants on the part of the lessee, his heirs, executors, administrators, and assigns; (that is to say), to keep the tillage land of the said premises in due course of husbandry without setting potatoes in larger quantities than for the use of himself and his family; and without sowing any rape seed, mustard seed, or turnip seed, for the purpose of producing such seeds; *And* to keep and preserve the buildings and gates belonging to the said premises in good and sufficient repair during the said term (*Except* the walls, timbers, and roofs, and except when the said buildings shall be damaged by fire, tempest, or other inevitable accident; in all such excepted cases and particulars the said messuages and buildings to be repaired by the said [*lessor*];) *And* yearly to cleanse and scour sixty roods of hedging in the most necessary parts of the said premises; *And* not to cut, prejudice, or destroy any of the trees, thorns, and quicksets growing in and upon the said premises, except such as shall be necessary for the repairs of the hedges, and those only at seasonable times of the year; *And* to the utmost of his power to preserve the said trees, thorns, and quicksets; *And also* during the said term, with his cattle to eat and consume upon the premises the hay and straw that shall yearly grow thereon; *And* to lay and spread all the manure which, during the said term, shall arise from the said farm, upon the lands and grounds which shall be ploughed and had in tillage, in a good and husbandry-like manner; *And* to permit and

Lease and counterpart at lessee's expense.

Covenants to be contained in the lease.

Course of husbandry.

Covenant to keep the premises in good repair.

To cleanse hedging.

Not to cut trees, &c.

To preserve trees, &c.

To consume hay and straw on the estate

To spread manure.

(*g*) [*Vide infra*, Vol. 4, p. 526.]

(*h*) If by a tenant in tail,

Tenant in tail.

"and such other covenants and clauses, as are required by the statute [32 Hen. 8, c. 28] to make leases valid against the issue in tail;"

3. FOR A LEASE OF A FARM.

suffer the said [*lessor*], his heirs and assigns, and his and their servants, tenants, and labourers, at the usual times in the spring next before the expiration of the said term, to enter upon the said premises, or any part thereof, for the purpose of preparing the same for husbandry; *And* to insure the buildings on the said premises in the sum of £——, in the names of the said [*lessor*] (*i*) and the said [*lessee*], in some or one of the public offices of insurance in London or Westminster, and to produce the receipts for the same; (*here mention the other special covenants*); *And also* a covenant on the part of the said [*lessee*], his executors, administrators, and assigns, not to assign, underlet, or part with the possession of any part of the said premises (except to a legatee or legatees, executor or executors, who shall take the same without giving any valuable consideration, or without any collusion or artifice to evade this provision), unless with the express license of the said [*lessor*] (*k*), his heirs or assigns in writing, for that purpose (*l*); *And also* a condition giving a power of re-entry, on the bankruptcy or insolvency of the said [*lessee*], his executors, administrators, or assigns, or on his or their suffering the said lease to be taken in execution, or doing any other act whereby the premises may become assigned or assignable, or on his or their breach or non-performance of any of the covenants, conditions, or agreements to be contained in the same indenture of lease; *But* the said [*lessor*] shall not be required to shew his title to grant the said lease: AND THE SAID [*lessor*], for himself, his heirs, executors, and administrators, doth hereby agree that the said [*lessee*], his executors, administrators, and assigns, shall and may, in the harvest next after the expiration of the said term, have and take a way-going crop of wheat or hard corn off one third part of the land then in tillage, as the same shall fall in due course of husbandry, so as that he thresh the same in the barn of the said premises before the thirteenth day of February then next; and leave

To permit lessor in the spring of the last year of the term to come upon the estate to prepare lands.

To insure.

Special covenants.

Not to assign or underlet,

unless with license.

Power of re-entry.

Lessor not to be required to shew his title.

Tenant to have a way-going crop.

(*i*) If by husband and wife—

"and [*wife*], his wife, her heirs and assigns,"

Husband and wife.

(*k*) If by husband and wife,

"and [*wife*], his wife, her heirs or assigns,"

Husband and wife.

(*l*) This should always be mentioned, either affirmatively or negatively, according to the intention of the parties.

3. FOR A LEASE OF A FARM.

the straw of such way-going crop and the manure to be produced in the winter and spring next before the expiration of the said term, for the use of the said [*lessor*], his heirs or assigns; *And* pay to the said [*lessor*], or his next succeeding tenant, upon demand, two pounds an acre for such way-going crop, and so in proportion for any greater or lesser quantity than an acre: AND THE SAID [*lessee*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*lessor*] (*m*), his heirs and assigns, that he the said [*lessee*], his executors or administrators, will or shall accept such lease on the terms and conditions aforesaid; and execute a counterpart thereof when required; and pay the charges for the same when prepared, as well as the charges for these presents (and a duplicate hereof) (*n*). IN WITNESS, &c. (*o*).

Covenant by lessee to accept lease, execute counterpart, and pay law charges.

(*m*) If by husband and wife seised in right of the wife, say, "and —— his wife, her heirs and assigns;"

(*n*) [As to the payment of the expenses of the lease and counterpart, *vide infra*, Vol. 4, p. 566.]

Execution by steward, &c.

(*o*) If executed by a steward or bailiff, say,

"IN WITNESS whereof, the said [*lessor*], by the said [*steward, &c.*] as his attorney lawfully authorised for this purpose, and the said [*lessee*] himself, have hereto set their hands."

[A. B. *the lessor*]
by
[C. D. *the steward*, &c.]
[E. F. *the lessee.*]

Sometimes it may be advisable for the lessor to approve the agreement, thus:

APPROBATION OF AN AGREEMENT MADE BY AN AGENT.

"I hereby declare my approbation of the within (*or* above) written agreement; (*or if on a separate paper*, the agreement made between my agent A. B. and C. D., bearing date the —— day of ——, 18—); and do hereby agree to grant the lease upon the terms therein mentioned. WITNESS my hand, the —— day of ——, 18—."

4. AGREEMENT *for a* BUILDING LEASE *of Freehold or Copyhold* (*a*) *Premises in which a Surety for the Lessee joins.*

4. FOR A BUILDING LEASE, WITH A SURETY FOR THE LESSEE.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, in the year of our Lord 18—, BETWEEN [*lessor*] of &c., of the first part, and [*lessee*] of &c., of the second part, and [*surety*] of &c., of the third part.

Parties.

FIRST, the said [*lessor*] in consideration of the rents and covenants hereinafter agreed to be paid and performed, doth hereby for himself, his heirs, and assigns, agree with the said

Consideration.

Agreement.

(*a*) As to leases of copyholds, *vide infra*, Vol. 4, pp. 232, 422, 780. The statute 32 Hen. VIII. c. 28, relative to leases by tenants in tail, or persons seised in right of their wives or churches, does not extend to copyhold estates. Gilb. Ten. 179, 185: Bac. Ab. *Leases* (D) 2, (E) 5; *Rowden* v. *Malster*, Cro. Car. 42. The late ingenious Mr. Watkins adds by way of explanation, (*i. e.* as I conceive), so as to authorise a lease without license or custom. But if the custom warrant a lease for twenty-one years, (see 4 Br. C. C. 415), or a license be obtained for that period, I apprehend such lease would be within the statute, and bind the wife and issue. A lease by custom or license is a common law interest: and though the statute cannot authorise the copyholder to create a common law interest to the prejudice of the lord, it may certainly bind that interest when created under a custom or license. 2 Watk. Cop. [194] (*g*). But according to Kitchen on Courts, one of the oldest books on copyholds, if a copyholder of an estate tail, by license of his lord, let for twenty years, rendering the ancient rent, and die, the issue in tail may enter and defeat the lease. Kitch. 168, 4th ed. And the prevailing opinion is, that a lease by a tenant in tail of a copyhold, even with license, would not bind the issue in tail, although it would bind the lord who granted the license, in case of escheat or forfeiture. So where tenant in tail of a legal estate in *copyholds* contracts to sell, &c., if he die without barring the entail, the issue in tail will not be bound. 1 Watk. Cop. 146. The lord of a manor cannot authorise an equitable tenant of a copyhold to demise, because there is no privity of estate between them, the person having the legal estate being the copyholder: and it seems clear, that an equitable tenant in tail of a copyhold cannot bind the issue in tail, or the remainder-man, either by a contract for a lease, or by a contract for sale.

Tenant in tail, &c., of copyholds of legal estate.

Of equitable estates.

4. FOR A BUILDING LEASE.

[*lessee*], his executors and administrators, that when and so soon as the said [*lessee*] (*b*), his executors or administrators, shall have erected, built, and finished the dwelling-house and premises hereinafter mentioned, he the said [*lessor*] will (*c*), grant and demise to the said [*lessee*], his executors and administrators, by a good and valid lease in the law, ALL THAT piece or parcel of land, &c. situate &c. with the appurtenances, which premises are more particularly delineated and described in the plan or ground-plot, drawn in the margin hereof, TO HOLD to the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— next ensuing, for the full term of —— years; AT AND UNDER the yearly rent of —— pounds, payable quarterly, on Christmas-day, Lady-day, Midsummer-day, and Michaelmas-day, free and clear of and from the sewers-rate, land-tax, and all and every other rate, tax, charge, assessment or imposition whatsoever, either parliamentary or parochial, to which the landlord, tenant, or premises is or are, or hereafter shall or may be, liable; WHICH indenture of lease and a counterpart thereof are to be prepared by the solicitor of the said [*lessor*], at the costs and charges of the said [*lessee*], his executors and administrators, *And* are to contain the several covenants, clauses, provisoes, agreements, and restrictions, usually reserved and contained in leases of houses (in London and Westminster) (*d*); *And also* the following covenants on the

Parcels.

Term.

Rent.

Lease and counterpart to be at lessee's expense.

Usual covenants to be contained in lease.

(*b*) The executors and administrators of every person are implied in himself, and are bound by every covenant, and also in a bond, without being named, Dyer, 14, pl. 69; unless it be such an act as is to be performed *personally* by the covenantor, and there has been no breach before his death. Co. Litt. 209. a.; Cro. Eliz. 553; 2 P. Wms. 197. But heirs must be expressly named in a writing under hand and seal, otherwise they are not chargeable. *Gifford* v. *Manley*, Cas. temp. Talbot, 108; 3 Bac. Abr. 458, *Heir*, &c. (F); Noy's Maxims, 200, 233, 241, 9th ed.

COPYHOLD. (*c*) If the premises are of copyhold tenure say,

To procure license to demise. "at his own expense, procure from the lord or lords, lady or ladies of the manor or manors, of which the premises hereinafter mentioned are held, a license or licenses, if the same should be necessary, enabling him to demise, and that he the said [*lessor*] will thereupon"

COPYHOLD. (*d*) If the premises are copyhold,

Not to contain any clause to cause a forfeiture. "but shall not contain any covenant or clause which may by any means cause a forfeiture of the said premises;"

4. FOR A BUILDING LEASE.

part of the lessee, that is to say: for keeping the said dwelling-house and premises insured against fire in the sum of —— pounds, in some or one of the public offices of insurance in London or Westminster; *And also*, for painting twice in oil colours, all the outside wood and iron work of the said premises once in every third year of the said term; *And also* for painting and papering the interior of the said premises once in every seventh year of the said term; *And also*, not to use upon the said premises any forge or anvil (save and except small forges to temper tools and other matters); nor to exercise or carry on any sort of manufactory thereon: *And* not to carry on any noisome, dangerous, or offensive trade or business therein or thereupon; *And not* to set up a steam-engine thereon; *And also*, the usual covenants for repairing and keeping in repair the said premises and every part thereof; *And* for yielding and delivering up the same at the end or other sooner determination of the said term, in good and proper repair, with all and every the fixtures, erections, and improvements which shall or may be made, fixed, or fastened, or set up in, upon, or about the said premises, which shall or may come under the denomination of landlord's fixtures: *And* for liberty for the lessor to enter and view the said premises twice or oftener in every year, and to give notice of repair, and for the lessee to repair accordingly within three months after every such notice; *And* the usual proviso for re-entry on non-payment of rent, or on breach or non-performance of covenants; AND THE SAID [*lessee*] for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*lessor*], his heirs and assigns, that he the said [*lessee*], his executors or administrators, will or shall except such lease, on the terms and conditions aforesaid, and execute a counterpart thereof, when required, and pay the charges of the same when prepared, as well as the charges for these presents (and a duplicate hereof); AND THE SAID [*lessee*] and [*surety*] as his surety do, and each of them doth hereby severally and respectively, and for their several and respective heirs, executors, and administrators, covenant and agree with the said [*lessor*] his heirs and assigns, that he the said [*lessee*], his executors or administrators, or, on his default, the said [*surety*], his executors or administrators, will or shall, on or before the —— day of —— next, at the costs, and charges of him or them, or one of them, in a good, sound, substantial,

And to insure.

For painting outside.

Painting and papering inside.

Not to use any forge or anvil,

or carry on a manufactory,

or any offensive trade.

For repairing.

For delivering up premises at the end of term,

with all fixtures, &c.

Liberty for lessor to enter to view repairs.

Power of re-entry.

Covenant by lessee to accept lease.

To execute counterpart, and pay the charges.

Covenant by lessee and his surety to build a dwelling-house, &c.

4. FOR A BUILDING LEASE.

and workmanlike manner, and with fit and proper materials of all kinds, to be approved by the architect (*or* surveyor) of the said lessor, and under the direction and inspection of his said architect (*or* surveyor) (*e*), erect, build, and complete [or cause (*f*) to be erected, built, and completed], and in a workmanlike manner finish, one or more good and substantial brick messuage or tenement, messuages or tenements, fit for habitation, and in all things conformable and agreeable to the specification thereof hereunder written; *And* will or shall lay out and expend thereon the sum of —— hundred pounds and upwards; *And also,* will or shall bear, pay, and discharge the said architect's (*or* surveyor's fees of five pounds per centum on the expenditure, for superintending and directing the same (*g*); AND for the true performance of the said agreement, each of the said parties bindeth himself, his heirs, executors, and administrators to the other of them, his executors, administrators, and assigns, in the sum (*h*) of

To expend a certain sum.

To pay architect's fees.

Liquidated damages.

Com. Forms, 436.

To pull down and rebuild.

(*e*) "Pull down the said messuage, tenement, and premises, and on the site thereof erect," &c.

(*f*) This is useless; he who causes payment pays. Serj. Williams, note, 1 Saund. 234 b (6). So he who causes to be built, builds.

Lessor to deliver abstract of his title.

(*g*) AND *it is hereby further agreed* by and between the said parties to these presents, that the said [*lessor*] will, at his own expense, within —— days from the date hereof, deliver to the solicitor of the said [*lessee*] an abstract of the title of the said [*lessor*] to the fee (*or* enabling him to grant the said lease) of the premises hereby agreed to be demised, and at his own expense produce the deeds and other evidences therein mentioned, at the office of the solicitor of the said [*lessee*], to be examined therewith: *And also,* in addition to the usual covenants by lessors, there shall be contained in the said indenture of lease a covenant to produce and shew forth the same deeds and evidences, at the request and at the costs and charges of the said [*lessee*], his executors, administrators, or assigns, and to permit him and them to take or have true and attested copies thereof at his or their own costs and charges;"

And covenant to produce deeds, and let lessee have copies.

Lessor not to deliver abstract of title.

or, "that the said [*lessor*] shall not be called upon to shew his title to grant the said lease of the premises hereby agreed to be demised;"

Parties have no

(*h*) In all cases where penalties are inserted in a case of non-perform-

£—— of lawful money of Great Britain, to be recovered against the defaulters as liquidated damages, in any of her Majesty's courts of record at Westminster. In WITNESS, &c.

4. FOR A BUILDING LEASE.

THE SPECIFICATION ABOVE REFERRED TO.

Specification.

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ance, this does not release the parties from their agreement, but they must perform it notwithstanding, and have not an option to pay the penalty and be released from the performance of the agreement. *Vide infra*, tit. BOND.

option to pay a penalty and be released from the contract.

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5. AGREEMENT *for a* BUILDING LEASE *of* PART OF PREMISES *held under an Agreement for Building Leases, with* AGREEMENT *by the* GROUND LANDLORD *to grant a* SEPARATE LEASE *of the Premises, discharged from any Liability on account of, or Connexion with, the other Premises.*

5. FOR A BUILDING LEASE OF PART OF PREMISES HELD UNDER AN AGREEMENT FOR BUILDING LEASES.

ARTICLES OF AGREEMENT made and entered into this —— day of —— in the year 18—; BETWEEN [*the vendor*], of &c., of the first part; [*the purchaser*], of &c., of the second part; and [*the ground landlord*], of &c., of the third part.

Parties.

WHEREAS, by memorandum of agreement, bearing date on or about the —— day of —— last past, and made between the said [*landlord*], of the one part; and the said [*vendor*], of the other part; the said [*landlord*] agreed to let unto the said [*vendor*] All *that* piece or parcel of ground, &c., *To hold* unto the said [*vendor*], his executors, administrators, and assigns, for the term of —— years, from the —— day of —— then next, *At* the clear yearly rent of —— pounds, payable quarterly, clear of the land-tax, sewers-rate, and all other rates and taxes whatsoever: and the said [*vendor*] agreed to expend the sum of —— pounds, in erecting —— dwelling-houses on the said piece or parcel of ground, within —— years from the date thereof, according to the plan and specification therein mentioned: *And* the said [*landlord*] agreed, that as soon as the said [*vendor*] should have

Recital of original agreement.

5. FOR A BUILDING LEASE OF PART OF PREMISES HELD UNDER AN AGREEMENT FOR BUILDING LEASES.

erected one of the said dwelling-houses, he the said [*landlord*] would grant to the said [*vendor*], his executors, administrators, and assigns, either a lease of the whole of the said premises, at the said yearly rent of —— pounds, or several separate leases of the said dwelling-houses and premises as they should be from time to time finished, or join with the said [*vendor*] in agreements for building leases of the remaining part of the said premises at apportioned rents, according to their respective values, to be ascertained by the surveyor of the said [*lessor*], to such person or persons as the said [*vendor*], his executors or administrators, should require and appoint; such separate leases, and agreements for leases to be granted, discharged from all connexion and liability on account of the rents, covenants, and conditions relating to the other part of the said premises not demised or agreed to be demised by such lease or agreement for a lease respectively: AND WHEREAS the said [*vendor*] hath erected one of the said dwelling-houses and premises to the satisfaction of the said [*landlord*]; AND the said [*purchaser*] hath agreed with the said [*vendor*] to purchase all his interest in the piece of the ground hereinafter described, for the price of £——, subject to the apportioned yearly rent of £——, which hath been ascertained by the surveyor of the said [*lessor*] to be the proportionate part of the said yearly rent of £——, which ought to be paid in respect of the said piece of ground; and thereupon the said [*lessor*] hath, upon the application of the said [*vendor*], consented to enter into the agreement hereinafter contained: NOW THESE PRESENTS WITNESS, that in consideration of the said sum of £——, of lawful money of Great Britain, to the said [*vendor*] well and truly paid by the said [*purchaser*], at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, and thereof and therefrom the said [*vendor*] doth acquit, release, and discharge the said [*purchaser*], his executors, administrators, and assigns, by these presents; he the said [*landlord*], by and with the consent, and at the request of the said [*vendor*], testified by his executing these presents, doth hereby for himself, his heirs and assigns, covenant and agree with the said [*purchaser*], his executors and administrators, that when and so soon as the said [*purchaser*], his executors or administrators, shall have completed and finished the several works and matters hereinafter particularly mentioned, that

Recital of contract.

Consideration.

Agreement by ground landlord to grant building lease.

5. FOR A BUILDING LEASE OF PART OF PREMISES HELD UNDER AN AGREEMENT FOR BUILDING LEASES.

he, the said [*landlord*], his heirs or assigns, will or shall grant and demise to the said [*purchaser*], his executors or administrators, by a good and valid lease in the law, ALL THAT piece or parcel of ground, situate &c., particularly mentioned and described in the margin hereof, with the erections and buildings then erected thereon, with their appurtenances, TO HOLD to the said [*purchaser*], his executors, administrators, and assigns, from the —— day of —— last past, for the full term of —— years, AT and under the yearly rent of £——, payable quarterly, on Michaelmas-day, Christmas-day, Lady-day, and Midsummer-day, clear of the land-tax, sewers-rate, and all other rates, taxes, charges, and assessments whatsoever: the first payment of the said rent by the said [*purchaser*], his executors and administrators, to begin and be made on the —— day of —— now next. WHICH indenture of lease, and a counterpart thereof, are to be prepared by the solicitor of the said [*landlord*], at the costs and charges of the said [*purchaser*], his executors and administrators: and are to contain the several covenants, clauses, provisoes, agreements, and restrictions, usually reserved and contained in leases of houses in London and Westminster (*or*, in the neighbourhood); *And* also a covenant on the part of the said [*purchaser*], for painting twice in oil colours all the outside wood and iron-work of the said premises, once in every third year of the said term; [(*a*) *And* for painting the interior of the said dwelling-house and premises, and papering the rooms on the ground and first floor once in every seventh year of the said term:] *And* also the usual covenant for repairing and keeping in repair the said premises, and every part thereof; *And* for yielding and delivering up the same at the end, or other sooner determination of the said term, in good and proper repair, with all and every the fixtures, erections, and improvements, which shall or may be fixed or fastened, or set up, in, upon, or about the said premises, which shall or may come under the denomination of landlord's fixtures; *And* for liberty for the lessor to enter and view the said premises twice or oftener in every year, and to give notice of repair, and for the lessee to repair accordingly within three months after every such notice; *And also* a covenant on the part of the lessee to insure the said premises against

Term.

Rent.

Lease and counterpart to be prepared by solicitor, to landlord, at lessee's expense: and to contain usual covenants;

and a covenant to paint outside wood and iron work every third year.

To paint the interior,

and paper the ground and first floor every seventh year.

To repair.

To deliver up at the end of term,

with the landlord's fixtures.

Liberty for lessor to enter to view, &c.

To insure.

(*a*) This is not a usual covenant.

5. FOR A BUILDING LEASE OF PART OF PREMISES HELD UNDER AN AGREEMENT FOR BUILDING LEASES.

fire in some insurance office in London or Westminster, in the name of the lessor and lessee, in the sum of £—— or more: *And also,* the usual proviso for re-entry on non-payment of rent [or (*a*) on breach or non-performance of the covenants.] AND THE SAID [*purchaser*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*landlord*], his heirs and assigns, to accept such lease on the terms and conditions aforesaid, and to execute a counterpart thereof when required, and to pay the charges for the same when prepared, and also the charges for these presents. AND THE SAID [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*vendor*], his executors and administrators, that he the said [*purchaser*], his executors or administrators, will or shall, on or before the —— day of —— next, at his or their own costs and charges, in a good, sound, substantial, and workmanlike manner, and with fit and proper materials of all kinds, to be approved by the architect of the said [*landlord*], and under the direction and inspection of the said architect lay out and expend the sum of £—— in erecting, building, completing and finishing, and rendering fit for habitation, upon the said piece of ground, one brick dwelling-house, covered with slates or tiles with such party walls, conveniences, and necessaries to the same, as shall be requisite and fitting, and in all things conformable and agreeable to the specification thereof hereunder written; *And also,* bear, pay and discharge the said architect's fees of five pounds per centum on the expenditure, for superintending and directing the same; AND for the true performance of the said covenants and agreements, each of the said parties bindeth himself, and every of them bind themselves, his and their heirs, executors, and administrators, to the others and other of them, in the penalty of £——, of lawful money of Great Britain, to be recovered against the defaulter or defaulters as liquidated damages in any of her Majesty's courts of record at Westminster (*b*). IN WITNESS, &c.

Power of re-entry.

Covenant by lessee with landlord to accept lease.

Covenant by lessee with vendor to erect a dwelling-house, &c.,

and pay architect's fees.

Liquidated damages.

Specification.

THE SPECIFICATION TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

(*a*) *Vide post,* p. 447. (*b*) *Vide ante,* p. 436, n.

6. AGREEMENT *for a* BUILDING LEASE, *or several Building Leases, specially drawn, with proper Provisions for an extensive Undertaking.* 6. FOR A BUILDING LEASE.

ARTICLES OF AGREEMENT made and concluded the —— day of ——, 18—, BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part. Parties.

WHEREAS the said [*lessor*] hath agreed to let, and the said [*lessee*] hath agreed to take, the piece or parcel of ground hereinafter particularly mentioned and described, upon the terms and conditions hereinafter expressed: NOW THEREFORE THESE PRESENTS WITNESS, and the said [*lessor*], doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessee*], his executors, administrators, and assigns, in manner and form following, that is to say, *That* he the said [*lessor*], his heirs or assigns, will or shall upon the request, and at the costs and charges of the said [*lessee*], his executors, administrators, or assigns, when and so soon as the messuages or dwelling-houses, erections, and buildings hereinafter covenanted to be erected and built, shall be erected, built, and covered to the approbation and satisfaction of the architect or surveyor for the time being of the said [*lessor*], his heirs, or assigns, as hereinafter mentioned, by a good and sufficient indenture of lease, or by good and sufficient indentures of lease, demise and grant unto the said [*lessee*], his executors, administrators, and assigns, ALL THAT piece or parcel of land, situate and being at &c., and containing &c., and bounded &c. TO HOLD the said piece or parcel of land, and the messuages or dwelling-houses, erections, and buildings intended to be thereupon erected and built, with the appurtenances, unto the said [*lessee*] his executors, administrators, and assigns, from the twenty-fifth day of March now, next for and during and unto the full end and term of ninety-nine years thence next ensuing, and fully to be complete and ended: At the yearly rent of a pepper-corn for the first two years of the said term; AND AT

Recital of agreement for lease.

Covenant by lessor to grant leases when works finished.

Parcels.

Term.

At the rent of a pepper-corn for

6. FOR A BUILDING LEASE.

AND UNDER the clear yearly rent or sum of £—— for the remainder of the said term, payable quarterly, that is to say, on the twenty-fourth day of June, the twenty-ninth day of September, the twenty-fifth day of December, and the twenty-fifth day of March, in every year, free and clear of the land-tax, sewers-rate, and all other rates, taxes, assessments, and impositions, of what nature or kind soever, parliamentary, parochial, or otherwise; the first quarterly payment of the said rent of £—— to be made on the twenty-fourth day of June, which will be in the year of our Lord 18—: AND in consideration thereof, the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant and agree with the said [*lessor*] his heirs and assigns, in manner following, that is to say, *That* he the said [*lessee*] his executors, administrators, or assigns, will or shall, on or before the —— day of ——, 18—, at his or their own proper costs, and charges, under the inspection, and to the satisfaction of the architect or surveyor for the time being of the said [*lessor*], his heirs and assigns, erect, build up, and cover in upon the pieces or parcels of land hereby agreed to be demised, with stock bricks, and other good and proper materials of all sorts, in a substantial and workmanlike manner, according to a plan and elevation, thereof mentioned or contained in the schedule hereunder written (*a*), twenty messuages or dwelling-houses of the first rate of building to be covered with slate, and to have leaden gutters weighing at least seven pounds to the superficial foot (*b*); the front and back walls of each messuage or dwelling-house to be two bricks and a half thick in the cellar story; two bricks thick in the parlour and one pair of stairs story: and at least one brick and a half thick above the one pair of stairs story (except the parapets) and the parapets to be coped with Portland stone, and all the cross partitions to be carried on brick walls the height of the cellar story. *And also,* that he the said [*lessee*], his executors, administrators, or assigns, will or shall, in erecting and building the said

the first two years; and £—— for the remainder of the term, payable quarterly.

Covenant by intended lessee to build.

Under inspection of architect, &c.

Dwelling-houses, &c. of the first rate.

Leaden gutters.

To make an area with stone curb, and iron railing.

Conformably to other houses.

(*a*) " and conformably, or as near as may be, to the houses already built by [C. D.] in the said intended street, a range of twenty messuages, &c., " (*as above.*)

Sheet-copper gutters.

(*b*) *or* " with sheet-copper, weighing at least sixteen ounces to the superficial foot;"

messuages or dwelling-houses, make and leave an area six feet wide, and fix a stone curb eight inches by six inches, with iron railing five feet high thereon at the level, to be respectively ascertained and approved of by the said architect or surveyor of the said [*lessor*], his heirs and assigns; *And* will or shall pave the footway in the front thereof with Yorkshire Ealand-edge paving; and lay a curb thereto of Cornish-moor stone, the whole to be seven feet and six inches wide; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will or shall bear and pay a just and fair proportion (*c*) with the other tenants, lessees, and occupiers, of any other lands, tenements, or hereditaments of the said [*lessor*], his heirs or assigns, or of any other person or persons whomsoever, near or adjoining to the premises hereby agreed to be demised, of all costs, charges, and expenses incurred, or to be incurred, in the cutting, dividing, building, or making of all or any other pavements, ways, channels, public sewers, wydraughts, drains, and gutters, in, upon, through, under, or about the premises hereby agreed to be demised, or any part or parts thereof; such proportion to be ascertained by the said architect or surveyor of the said [*lessor*], his heirs or assigns: AND IT IS HEREBY COVENANTED AND AGREED by and between the said parties hereto, that it shall be lawful for the said [*lessee*], his executors, administrators, or assigns, at any time or times hereafter during the said term, to make and build

6. FOR A BUILDING LEASE.

To pave the footway.

To pay a proportion of the expense of other pavements, ways, channels, &c.

Agreement that lessee may make vaults under the street,

(*c*) "of all expenses to be incurred in building and making a common sewer under ground, in front of the said messuages or dwelling-houses, such proportion to be ascertained by the said architect or surveyor of the said [*lessee*], his heirs or assigns; but that he the said [*lessee*], his executors, administrators, or assigns, will not nor shall, at any time or times hereafter, convert or turn the soil of or from any privy or bog-house, of or belonging to the aforesaid messuages or dwelling-houses, or of or belonging to any other messuages or dwelling-houses whatsoever, into the said common sewer so to be built and made as aforesaid; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will or shall bear and pay a just and fair proportion," &c.

To pay expenses of making common sewer,

6. FOR A BUILDING LEASE.

arched vaults in the front of all or any of the said messuages or dwelling-houses under the surface of the said intended street: *Provided*, that such vaults be made with good sound bricks: and such area, stone curb, iron railing, foot pavement and curb thereto, as hereinbefore mentioned to be made, shall be left and made, and in no wise injured thereby, but not otherwise; *And also*, that it shall be lawful for the said [*lessee*], his executors, administrators, or assigns, at any time or times hereafter during the said term, to erect and build a mews of stables and coach-houses at a proper and convenient distance behind the said messuages or dwelling-houses covenanted to be erected and built as aforesaid: *And also*, to erect and build other coach-houses and stables, to be attached to the gardens of or belonging to the said messuages or dwelling-houses: *Provided*, that all and every such coach-houses and stables be erected and built of good and proper materials, in a substantial and workmanlike manner, and covered with slate, and be situated and finished to the approbation and satisfaction of the said architect or surveyor of the said [*lessor*], his heirs or assigns, but not otherwise (*d*); *And* that when and so soon as the said architect or surveyor shall have made his report to the said [*lessor*], his heirs or assigns, that the said messuages or dwelling-houses are erected, built up, and covered to his approbation and satisfaction, according to the true intent and meaning of these presents, the said [*lessee*], his executors, administrators, or assigns, shall be entitled to have separate leases of each messuage or dwelling-house, with the ground and appurtenances thereunto belonging, for the term of ninety-nine years, or so much thereof as shall be then to come unexpired, and at such rents as shall be respectively ascertained by the said architect or surveyor of the said [*lessor*], his heirs or assigns, in a just and fair proportion to the said gross rent of £——, on executing counter-

or build mews or stables and coach-houses,

or build other coach houses and stables;

Lessee to be entitled to have separate leases, when works finished.

---

or carry drains to the common sewer.

(*d*) "*And also*, to carry any drains from the said messuages or dwelling-houses for conveying water or soil from a water-closet into the common sewer, belonging to the said [*lessor*], without paying any thing for the use thereof, but not to carry soil from any privy or bog-house into or towards the said common sewer;"

6. FOR A BUILDING LEASE.

parts of such leases respectively, and paying for each of such leases and a counterpart thereof a sum not exceeding £——: AND IT IS HEREBY FURTHER COVENANTED AND AGREED by and between the said parties, that in all and every of the leases to be granted by the said [*lessor*], his heirs or assigns, in pursuance of these presents, shall be contained covenants on the part of the said [*lessee*], his executors, administrators, and assigns, to complete the messuages or dwelling-houses, with the appurtenances so to be demised as aforesaid, and render the same fit for use and habitation, in a good, substantial, and workmanlike manner, with all necessary and proper fixtures and fastenings to the same; *Also*, to pay the rent to be thereby reserved, and the land-tax, sewers-rate, and all other taxes, rates, and assessments, of what nature or kind soever, parliamentary, parochial, or otherwise, payable for or in respect of the premises thereby to be demised, or any part thereof; *Also* to repair, amend, support, and keep the same premises at all times during the said term, with or without notice from the said [*lessor*], his heirs or assigns, in good and substantial repair; *Also*, to paint the external wood work and iron work of the same premises, with two coats of paint in oil colour every fourth year; *Also*, to insure the premises for the full value of so much thereof as can be damaged by fire in some public office of insurance from fire, in London or Westminster; and to keep the same so insured during the said term, and to produce and shew to the said [*lessor*], his heirs or assigns, or his or their steward, agent, or receiver of rents for the time being, yearly and every year, the receipt given by or on the behalf of such office, acknowledging the payment of the premiums on the policy whereby the same premises shall be insured for the current or ensuing year; *Also*, to pay a fair and just proportion of all expenses and charges for renewing or repairing pavements; renewing, cleansing, or repairing walls, gutters, pipes, drains, and water-courses, which shall be used in common by the occupiers of the said demised premises, and the occupiers of any other messuages, dwelling-houses, or other erections already erected, or hereafter to be erected on any other part of the now estate of the said [*lessor*], or of any other person or persons near or adjoining thereto; *And* to leave the premises at the end of the term agreed to be granted, in good and substantial repair, together with all

Leases to contain covenants to complete houses properly.

To pay rent and taxes.

To repair.

To paint.

To insure.

To pay proportion of expenses for renewing and repairing pavements, &c. with adjoining occupiers.

To leave premises in repair with the fixtures, &c.

6. FOR A BUILDING LEASE.

marble and other chimney-pieces, mantel-pieces, hearths, hearth-stones, covings, jambs, foot pieces, and slabs, sash and other windows, casements, window shutters, doors, locks, keys, bolts, bars, and fastenings whatsoever; and pumps, water-closets, cisterns, and all things thereunto belonging; and all wainscoat partitions, fixed presses, shelves, dressers, drawers, pipes, pumps, posts, pales, rails, and other fixtures, fixed or fastened to the premises, or which shall be found thereupon, or upon any part thereof, during the last seven years of the said term; *Also,* to permit the said [*lessor*], his heirs and assigns, and his and their respective agents, surveyors, and workmen, to enter upon the premises agreed to be demised at any time or times during the term, for the purpose of surveying the same, and the state and condition thereof, and examining if any and what repairs are or may be wanting; and to repair, within three calendar months, to the approbation and satisfaction of the architect or surveyor for the time being of the said [*lessor*], his heirs or assigns, every defect which shall be found upon such survey or examination, and of which notice in writing shall be given at or upon the said premises; *Also,* to permit the said [*lessor*], his heirs or assigns, or his or their respective agents, surveyors, and workmen, to enter into and upon the said premises, or any part thereof, at any time or times during the last seven years of the said term, for the purpose of taking a schedule or schedules of the fixtures therein or thereupon, or in or upon any part thereof; *Also,* to restrain and prevent the said [*lessee*], his executors, administrators, and assigns, from cutting, maiming, or injuring any of the principal timbers or walls of the building or buildings, or from letting or converting any part of the premises into a shop for trade, or suffering any open or public shew of business therein, without the license of the said [*lessor*], his heirs or assigns, in writing, for that purpose first obtained: And from committing or suffering any annoyance to the other tenants, lessees, or occupiers of any other messuages, dwelling-houses, lands, or other hereditaments of or belonging to the said [*lessor*], his heirs or assigns, near or adjoining the premises agreed to be demised; *And also,* a clause for re-entry, on non-payment of the rent for twenty-one days, after the aforesaid days of payment, if the same should be demanded upon or at any time after such twenty-one days, and not paid

To permit lessor to enter and view the state of the premises.

And to repair according to notice.

To permit lessor during last seven years to enter to make a schedule of fixtures.

To restrain lessee from injuring principal timbers, &c. or carrying on any business there.

And from committing annoyance to other tenants.

Power of re-entry on non-payment of rent;

6. FOR A BUILDING LEASE.

when demanded (*e*): *And also* a covenant on the part of the said [*lessor*], his heirs and assigns, for the quiet possession of the premises so to be demised, against any person or persons claiming under him or them, or his or their ancestors, he the said [*lessee*], his executors, administrators, or assigns, paying the rent and performing the covenants and agreements thereby on his and their part agreed to be paid and performed; *And also*, all other covenants, clauses, and agreements, usual, necessary, or proper to be inserted and contained in leases of the like kind. AND LASTLY, the said [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree, to and with the said [*lessor*], his heirs and assigns, that he the said [*lessee*], his executors, administrators, or assigns, will or shall accept and take leases of the said pieces or parcels of land, with the messuages or dwelling-houses, erections, and buildings, to be thereupon erected and built as aforesaid, under the terms and conditions hereinbefore expressed, and execute counterparts thereof respectively, and pay such sum of money as aforesaid for each and every such leases and counterparts; and also the expenses of preparing and executing these presents and the counterpart thereof. (*Proviso, that agreement shall not amount to a demise, ut ante, p.* 427). IN WITNESS, &c.

by lessor for quiet enjoyment;

and all other usual covenants.

Covenant to accept leases and execute counterparts and pay law charges.

(*e*) Sometimes there is a clause of re-entry on breach or non-performance of any of the covenants or agreements contained in the lease, *ut ante*, p. 440; but that clause is not unfrequently omitted in common leases, because it may subject the lessee to the forfeiture of his lease, by neglecting to do perhaps some very trivial thing; and in building leases it is generally omitted.

7. AGREEMENT *for a* FINISHING LEASE *of a Dwelling-House nearly completed by the Lessor, or for an* UNDERLEASE.

7. FINISHING, OR UNDERLEASE.

ARTICLES OF AGREEMENT made and entered into the —— day of ——, 18—, BETWEEN [*lessor*], of

Parties.

7. FINISHING, OR UNDER-LEASE.

&c., of the one part; and [*lessee*], of &c., of the other part.

Consideration. Agreement.

FIRST, the said [*lessor*], in consideration of the rents, covenants, and agreements hereinafter mentioned, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*lessee*], his executors and administrators, that when and so soon as the said [*lessee*], his executors, or administrators, shall have completed and finished the several works and matters hereinafter particularly mentioned, he the said [*lessor*], his (*a*) heirs or assigns, will or shall grant and demise to the said [*lessee*], his executors, administrators, or assigns, by a good and valid (*b*) lease, ALL THAT messuage tenement, and premises, situate and being on the —— side of —— street, in the parish of &c., and numbered —— in the said street, with all and singular the appurtenances thereunto belonging, together with the joint use of the court or passage behind the same, in common with the occupiers of the adjoining houses, TO HOLD to the said [*lessee*], his executors, administrators, and assigns, from the —— day of ——, for the full term of —— years, AT AND UNDER the yearly rent of £——, payable half-yearly, on Midsummer day and Christmas-day [and each half-year's rent to be paid in advance (*c*),] free and clear of and from the sewers-rate, and all and every other rate, tax, charge, assessment or imposition whatsoever, either parliamentary or parochial, to which the landlord, tenant, or premises is or are, or hereafter shall or may be liable. WHICH indenture of lease, and a counterpart thereof, are to be prepared by the solicitor of the said [*lessor*], at the costs and charges of the said [*lessee*], his executors, administrators, or assigns, and are to contain the several covenants, clauses, provisoes, agreements, and restrictions, usually contained in leases of houses in London and

When works are finished.

To grant a lease.

Parcels.

Term.

Rent.

To be paid half a year in advance.

Free from taxes.

Lease and counterpart to be prepared by lessor's solicitor at lessee's costs;

and to contain usual clauses.

UNDERLEASE.

(*a*) If it be an underlease, say,
"his executors, administrators, or assigns,"

(*b*) "underlease,"

(*c*) "for the first two years of the said term."

This is an unusual clause; but circumstances sometimes render it prudent.

Westminster (*d*); *And moreover* a covenant on the part of the lessee for payment of the said rent half-yearly [in advance] as aforesaid, during the whole of the said term, with power to distrain on non-payment thereof; *And* for painting twice in oil colours all the outside wood and iron work of the said premises once in every third year of the said term; [*And* (*e*) for painting all the iron columns in front of the said premises of a Bath stone colour, every fifth year, and not oftener, between the first and tenth day of May, with anti-corrosion paint; And at the same time for painting in good oil colours the outside shutters of the shop and street door of an oak colour, and also at the same time to colour and clean all the stucco and Bath stone-work of the said premises and colonnade, of a Bath stone colour, in order to preserve and keep up the character and uniformity thereof with the adjoining premises, forming the west side of the said street; *And also*

7. FINISHING, OR UNDERLEASE.

And to pay the rent in advance.

To paint outside every third year.

To paint every fifth year the iron columns,

outside shutters

and street door,

and to colour and clean the stucco and Bath stone-work and colonnade.

To paint and paper interior

(*d*) If it be an underlease, say,

UNDERLEASE.

"and such other covenants, provisoes, and agreements on the part of the lessee, as are contained in the lease whereby the said [*lessor*] holds the said premises; AND IT IS HEREBY FURTHER AGREED between the said parties, that the said [*lessor*] shall not be required to produce any further evidence of the title to the said premises than a lease for years from [*original lessor*] to ([*original lessee*], and an assignment thereof from him to) the said [*lessor*], and that the said [*lessor*], his executors, administrators, or assigns, will or shall covenant to produce the said lease (and assignment), and to permit the said [*lessee*], his executors, administrators, and assigns, at his or their own charges, to take or have attested copies thereof; *And also* to indemnify the said [*lessee*], his executors, administrators, and assigns, from all losses, costs, charges, damages, demands, and evictions, which he or they may sustain or be put unto on account of non-payment of the rent, or non-performance of the covenants, conditions, or agreements reserved or contained in the same original lease, by the said [*lessor*], his executors, administrators, or assigns*;"

Lessor not to produce freehold title; but to produce, and permit lessee to take, copies of lease and assignment.

Lessor to covenant to indemnify lessee against rent and covenants in original lease.

(*e*) These are special covenants.

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* *Vide* com. Dig. *Covenant* (A. 4); Raym. 257.

7. FINISHING, OR UNDER-LEASE.

for painting and papering the interior of the said premises once in every seventh year of the said term; *And also* proper, and necessary covenants for prohibiting and restraining the lessee from altering the front or any part of the exterior of the said premises, without license in writing of the lessor; or in any manner writing upon or disfiguring, or fixing any shew or sign-board upon the said columns or colonnade, or any part of the said premises, except writing the name and trade or business of the occupier over or on the sides of the shop and street door; *And also* not to expose any goods or other articles for sale outside the said premises; And also not to use any lamps, flambeaux, fireworks, or illuminations, upon or over the said colonnade or any part thereof on any occasion whatever]; *And* not to use or carry on any noisome or dangerous or offensive trade or business therein or thereupon, and particularly the trade and business of a print or caricature seller, or public auctioneer; or (*f*) any trade, business, mystery, or occupation which shall or may be deemed hazardous on account of fire, and thereby subject the said premises to more than the common premium of insurance; [*And* generally to do every thing requisite and necessary for preserving and maintaining the due character and uniformity of the said premises, as part of the west side of the said street; *And* not to make, or permit to be made, without license from the lessor, any doorway access, or communication whatever into or from the —— from, by, or through the said premises agreed to be demised, or any part thereof]; *And* not to alter, remove, or take away any of the doors, windows, or partitions of the said premises, without the license of the lessor in writing; *And also* the usual covenants for repairing and keeping in repair the said premises, and every part thereof, [and the colonnade in front of the same], and yielding and delivering up the same at the end or sooner determination of the said term, in good and proper repair, with all the fixtures, erections, and improvements which shall or may be made, fixed or fastened, or set up in, upon, or about the said premises [save and except the counter and fittings up of the shop]; *And* for liberty for the lessor to enter and view the said premises twice or oftener in every year, and to give notice of the repairs, and that the

every seventh year.

Not to alter the front or exterior of premises, without consent.

Not to fix shew-board, &c. except name and trade, over or on the side of shop or street door.

Not to expose goods for sale on outside.

Not to use lamps, &c. upon or over colonnade.

Not to carry on dangerous or offensive trades.

To preserve the uniformity of premises.

Not to make a passage through premises without consent.

Not to alter or remove doors, &c. without license.

To repair, &c. and deliver up at end of term.

With the fixtures, &c., except the counter, &c.

Lessor to enter to view and give notice of reparations.

(*f*) This is introduced when the lessee is not bound to insure.

7. FINISHING, OR UNDER-LEASE.

lessee shall repair accordingly, within three months after every such notice; *And* the usual proviso for re-entry on non-payment of the rent, or on breach or non-performance of covenants: AND THE SAID [*lessee*], for himself, his executors and administrators, doth hereby agree to accept such lease on the terms and conditions aforesaid, and to execute a counterpart thereof when required, and to pay the charges for the same when prepared, and of this agreement [and a duplicate hereof]; *And also* that the said [*lessee*], his executors or administrators, will or shall, on or before the —— day of —— now next, at his or their own costs and charges, paper all the rooms in the first, second, and third floors of the said house with proper and suitable paper and bordering; *And also* set up a dresser and shelves, and a proper and substantial leaden cistern cased with wood, with leaden water-pipes thereto in the kitchen, which with all other fixtures, fastenings, erections, and improvements, shall remain at the end of the said term for the benefit of the said [*lessor*], his (*g*) heirs and assigns. IN WITNESS, &c.

Lessee to repair accordingly.

Power of re-entry.

Covenant by lessee to accept lease, execute a counterpart, and pay law charges.

To paper rooms in first, second, and third floors.

To make dresser and shelves, and cistern in kitchen.

(*g*) If it be an underlease, "his executors, administrators, and assigns."

UNDERLEASE.

8. AGREEMENT *by an Incumbent for a Lease of* GLEBE LANDS (*a*).

8. FOR LEASE OF GLEBE LANDS.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—, BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part.

FIRST, the said [*lessor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*lessee*], his executors, administrators, and assigns,

Agreement to grant lease.

(*a*) As to leases by ecclesiastical persons, *vide infra*, Vol. 4, p. 244.

8. FOR LEASE OF GLEBE LANDS.

in consideration of the rent, covenants, and agreements hereinafter mentioned and contained, that he the said [*lessor*] will [on or before the —— day of —— now next or] when thereunto required in writing by the said [*lessee*], his executors, administrators, or assigns, demise and lease unto the said [*lessee*] his executors, administrators, and assigns, ALL THOSE the glebe lands belonging to the rectory of the parish of ——, and the orchard adjoining to the parsonage-house, together with the barn, hog-sty, and cart-house, and the yard where they stand, also belonging to the said rectory or parsonage, with their appurtenances, [EXCEPT the timber and timber trees, and the loppings thereof, and the loppings of all other trees], TO HOLD the same unto the said [*lessee*], his executors, administrators, and assigns, for the term of —— years, if the said [*lessor*] should so long live, and continue rector (*b*) of the said parish; AT the yearly rent of £—— clear of all taxes and deductions whatsoever, to be paid half-yearly, on the —— day of —— and the —— day of ——, and the first half-yearly payment to be made on the —— day of —— now next (*c*) WHICH indenture of lease, and a counterpart thereof shall be prepared by the solicitor of the said [*lessor*], and shall contain, in addition to all usual and accustomed covenants on the part of the said [*lessee*], his executors, administrators, and assigns, in leases of the like nature, a covenant to repair, sustain, and uphold the chancel of the parish church of —— aforesaid during the said term; *And also* to exonerate, discharge, and save harmless the said [*lessor*], his executors, and administrators therefrom (*d*); *And also* to repair, amend, maintain, and keep the said barn, hog-sty, and cart-house, and the hedges, ditches, gates, pales, and fences of the said premises, in, by, and with all necessary and tenantable reparations, amendments, and cleansings whatsoever during the said term; *And also* to keep the said glebe lands in good heart and condition, according to the course of husbandry used and approved in the said parish. (*Add any other covenants agreed on, usual in agreements for leases of lands; for which see* p.

Parcels.

Except timber, &c.

Term.

Rent.

Lease to be prepared by lessor's solicitor, and to contain usual covenants;

and to repair chancel of parish church.

To indemnify lessor therefrom.

To repair buildings and fences.

To cultivate lands.

Other covenants.

(*b*) As to these words, *vide infra*, Vol. 4, p. 254, and *Price* v. *Williams*, 1 Mee. & W. 6.

(*c*) Add clause for additional rent for breaking up glebe lands, as in page 429, *ante*.

(*d*) "respectively"

8. FOR LEASE OF GLEBE LANDS.

430, ante). *And also* a proviso, making void the said intended lease, on non-payment of the said rent twenty-one days after the same shall become due and be demanded upon or at any time after the same twenty-one days, and not paid when demanded, or (*e*) on breach or non-performance of any of the covenants to be contained in the said lease on the part of the said [*lessee*], his executors, administrators, or assigns, or on his or their bankruptcy or insolvency; AND THE SAID [*lessee*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*lessor*], his executors and administrators, that he the said [*lessee*], his executors or administrators, will execute a counterpart of such lease, whenever the same shall be tendered; *And also* will pay the expense of preparing the same lease and counterpart, and also the expense of preparing this agreement and a duplicate hereof. AND IT IS FURTHER AGREED, that the said lease shall contain a covenant on the part of the said [*lessor*], his heirs, executors, or administrators, to allow the said [*lessee*], his executors and administrators, from and off the said premises, competent and sufficient rough timber for repairing and amending the chancel of the said parish church and all the erections and buildings on the said premises; *And also*, that the said [*lessee*], his executors, administrators, or assigns, on regularly paying the said rent and performing the covenants to be contained in the said lease, shall hold and enjoy the said lands and premises during the said term, if the said [*lessor*] should so long live and continue rector of the said parish, without any disturbance whatsoever, by the said [*lessor*] or any other person. IN WITNESS, &c.

Proviso to make lease void on non-payment of rent or breach of covenants.

Covenant by lessee to execute a counterpart of lease,

and pay the expenses of lease, counterpart, and this agreement.

Lease to contain covenant by lessor,

to allow rough timber;

for peaceable enjoyment.

(*e*) *Vide ante*, p. 447, (*e*).

9. PURCHASE OF FEE-SIMPLE.

9. AGREEMENT *for the* SALE *of a freehold Estate; a short Form* (*a*).

Parties.

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—, BETWEEN [*vendor*], of &c., for himself, his heirs, executors, and administrators, of the one part; and [*purchaser*], of &c., for himself, his heirs, executors, and administrators, of the other part.

Vendor agrees to sell.

FIRST, the said [*vendor*] doth hereby agree with the said [*purchaser*], to sell to him, ALL THAT messuage, &c. situate at &c., with their appurtenances, for the sum of £——: *And*

To deliver abstract.

that he the said [*vendor*] will, within [*one calendar month*] from the date hereof, at his own expense, make and deliver to the said [*purchaser*], or his solicitor, an abstract of the title

And that necessary parties shall execute conveyance.

of the said [*vendor*] to the said [*parcels*]; *And also* that the said [*vendor*] or his heirs, and all other necessary parties, will and shall, on or before the —— day of —— next, on receiving from the said [*purchaser*], his executors or administrators, the said sum of £——, at the costs and charges of him the said [*purchaser*], his heirs, executors, administrators, or assigns, execute a proper conveyance, for conveying and assuring the fee-simple and inheritance of the said messuage and premises, with their appurtenances, unto the said [*purchaser*], his heirs, appointees, or assigns, free from all incumbrances by the said vendor or any of his ancestors; with the usual and other proper covenants according to the circumstances of the title, for the title, for quiet enjoyment, and for further assurance (*b*): AND THE

Purchaser

SAID [*purchaser*] hereby agrees with the said [*vendor*],

(*a*) [The law relating to conditions and contracts of sale will be treated of in a connected form under the title PURCHASE DEEDS; see, also the title ABSTRACTS, *ante*; and the precedents of *Conditions of Sale*, under the title Purchase Deeds, will furnish numerous forms of stipulations which may be adopted in private agreements.]

(*b*) See this clause more fully stated in the next precedent.

9. PURCHASE OF FEE-SIMPLE.

that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will or shall, on the execution of such conveyance as aforesaid, pay the sum of £—— unto the said [*vendor*], his executors or administrators; AND IT IS HEREBY FURTHER AGREED by and between the said [*vendor*] and [*purchaser*] (*c*), that the conveyance to the said [*purchaser*], his heirs, appointees, or assigns, shall be prepared by and at the expense of the said [*purchaser*], and that the same shall be settled and approved of on the parts of the said [*vendor*] and [*purchaser*], by their respective counsel or solicitors; *And* that each of them the said [*vendor*] and [*purchaser*] shall pay the fees of his own counsel, and the charges of his own solicitor: *And* that all rates, taxes, and outgoings, payable for or in respect of the premises, to the —— day of ——, shall be paid and discharged by the said [*vendor*], his executors or administrators; [*And lastly,* that (*d*),

agrees to pay consideration money.

Conveyance to be at purchaser's expense,

and be approved by the counsel or solicitor of each party, at his own expense.

Vendor to pay rates, &c. to a given day.

If abstract

(*c*) "that the expense of any covenant for the production of title-deeds, release, assignment, or surrender of any incumbrances, and of outstanding terms not already assigned to attend the inheritance, and which respectively shall be requisite or necessary to perfect the title to the said messuage and premises, shall be made, and prepared respectively, by and at the expense of the said [*vendor*]: *And also,*"

Fines, &c. to be at vendor's expense.

(*d*) A provision may also be inserted in agreements, making time the essence of the contract, in case the purchase-money be not paid at the day appointed; but of course clauses making agreements void if a title be not made, or the purchase-money paid by a stated time, should never be inserted unless it be the *express intention* of the parties.

Time the essence of the contract.

Where time is not deemed material, clauses to the following effect should be inserted, instead of the above in brackets:

When time is not the essence of the contract.

"that the said [*purchaser*] and his heirs shall have, receive, and take the rents and profits of the said messuage and premises, from the —— day of —— next, for his and their proper use; *And* that if the said conveyance should not be executed by the necessary parties, and the said purchase-money paid on or before the said —— day of ——, then and in such case the said [*purchaser*], his heirs, executors, or administrators, shall from the same —— day of —— pay interest for the said purchase-money, unto the said [*vendor*], his executors or administrators, after the rate of £——, per centum per annum."

Purchaser to receive the rents from a given time.

If consideration money be not paid on the day fixed, purchaser to pay interest.

9 PURCHASE OF FEE-SIMPLE.

should not be delivered, and title deduced within a given time agreement to be void.

if the said [*vendor*] should not deliver an abstract of his title to the said [*purchaser*] or his solicitor, before the expiration of [*one calendar month*] from the date hereof, or should not deduce a good and marketable title to the said messuage and premises, before the said —— day of ——, then, and in either of the said cases, immediately after the expiration of the said [*one calendar month*], or the said —— day of ——, then, and in either of the said cases, immediately after the expiration of the said [*one calendar month*] or the said —— day of ——, as the case may be, this present agreement shall (at the option of the said [*purchaser*], his heirs or assigns), be utterly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred; it being the true intent and meaning of the parties hereto, that in the event aforesaid, execution of this agreement shall not be enforced against the said [*purchaser*] by any court of equity, [notwithstanding any rule, if such rule there be, that time cannot be made the essence of a contract (*e*), or any other rule or maxim whatsoever].] IN WITNESS whereof the said parties have hereto set their hands, the day and year first above written.

Declaration that time shall be the essence of the contract.

[*Vendor.*]
[*Purchaser.*]

WITNESS to the signing by the above-named [*vendor*] and [*purchaser*]. }
[*Witness.*]

(*e*) It may now be considered as the settled doctrine of the Court of Chancery, that, by the terms of the agreement time may be made the essence of the contract. By Sir *John Leach*, V. C., *Reynolds* v. *Nelson*, 6 Madd. 26: *Hipwell* v. *Knight*, 1 You. & Col. 401. See 1 Sugd. Vend. 10th ed. 429.

10. PURCHASE OF FEE-SIMPLE.

10. AGREEMENT *for the* PURCHASE *of a* FREEHOLD *Estate.*

Parties.

ARTICLES OF AGREEMENT indented, made and entered into the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*] of &c., of the other part.

10. PURCHASE OF FEE-SIMPLE.

FIRST, the said [*vendor*], in consideration of the sum of £——, to be paid to him by the said [*purchaser*], pursuant to the covenant and agreement hereinafter in that behalf contained, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs and assigns, by these presents, *That* he the said [*vendor*] will, within —— months from the date hereof, at his own expense, cause and procure to be made and delivered unto the said [*purchaser*], his solicitor, or agent, a full, complete, and perfect abstract, in the usual manner, of the title of him the said [*vendor*] unto the fee-simple and inheritance of the messuages, &c. hereinafter mentioned; *And* if the counsel of the said [*purchaser*] should be of opinion that the said [*vendor*] has a good title thereto (*a*), *then* that he the said [*vendor*], his heirs or assigns, and all other necessary parties, will or shall, on or before the —— day of —— now next ensuing, by good and sufficient conveyances and assurances in the law, and with such covenants as are hereinafter mentioned, convey and assure, or cause to be conveyed and assured, unto and to the use of the said [*purchaser*], his heirs and assigns, or to such person or persons, or to such use or uses, as he or they shall direct or appoint, at his or their own proper costs and charges, ALL THOSE, &c. (*Describe the estate rather minutely*) containing, by estimation, &c., *Together* with the rights, members, and appurtenances to the said messuages (*b*), &c., and to every or any of them belonging, or in anywise appertaining (*c*). IN CONSIDERATION whereof, the said [*purchaser*] doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said [*vendor*], his executors, administrators, and assigns, *That* he the said [*purchaser*], his

Covenant by vendor to deliver abstract and made a conveyance within a limited period.

Parcels.

Covenant by purchaser to pay purchase-money upon having conveyance executed.

(*a*) *i. e.* such a title as a court of law or equity would take to be a good title; for if the purchaser's counsel should disapprove of a good and clear title, yet the purchaser would be bound to accept it. Argu., *Lewis* v. *Lechmere*, 10 Mod. 505. [And conversely a purchaser is not bound by his counsel's approval of the title. *Deverell* v. *Lord Bolton*, 18 Ves. 505.]

If the title be good, the purchaser is bound, although his counsel disapproves of it.

(*b*) If the land-tax has been redeemed, add,

"freed and discharged from the land-tax,"

Free from land-tax.

(*c*) If a pew in a church annexed to the house, a close of land, a right of way, or any other thing be intended to be reserved, the exception may be noticed here.

Exception.

30. PURCHASE OF FEE-SIMPLE.

heirs, executors, or administrators, will or shall, upon the —— day of ——, now next, and upon the making and executing such conveyances and assurances as aforesaid, pay or cause to be paid unto the said [*vendor*], his executors, administrators, or assigns, at ——, in the county of ——, the said sum of £—— in full, for the absolute purchase of the said messuages and hereditaments, but without any interest in the mean time for the same purchase-money: AND IT IS HEREBY AGREED, that in such conveyances and assurances, so to be made to the said [*purchaser*], his heirs and assigns as aforesaid, there shall be contained covenants on the part of the said [*vendor*], his heirs, executors, and administrators (*d*), *That*, notwithstanding any act done by him the said [*vendor*] (*e*), he the said [*vendor*], or his heirs, is or are, at the time of the execution of such conveyances, seised of or well entitled to, the inheritance in fee-simple in possession of and in the premises so agreed to be conveyed by him as aforesaid; *And* that he or they hath or have good right to convey the same unto or to the use of the said [*purchaser*], his heirs, appointees, or assigns, for ever; *And* that the said [*purchaser*], his heirs, appointees, and assigns, shall and lawfully may, peaceably and quietly, enjoy the same, without any interruption of, from, or by the said [*vendor*], or his heirs, or any other person or persons whomsoever, [claiming (*f*) under him or them (*g*)]; *And* free from all incum-

Covenants to be contained in conveyance on the part of vendor;

For title against his own acts;

Good right to convey.

Covenants to be contained in conveyance should be mentioned.

(*d*) It is prudent to insert in the contract what covenants the vendor is to enter into, as it prevents much delay in finally settling the conveyance; but at the same time the form, *ante*, p. 454, may be sometimes preferred, because, until the title has been investigated, it is impossible to know whether the covenants ought to be restrained or general. As to the usual covenants, on the sale of an estate in fee-simple, *vide infra*, tit. PURCHASE DEEDS.

General covenants for title.

(*e*) If the state of the title require that the covenants should be general, add,

"or by any other person or persons whomsoever,"

Against acts of ancestor, &c.

If the covenant be restrained to the acts of ancestor, &c. say,

"or by [*ancestor, &c.*] late of, &c. deceased,"

General covenants.

(*f*) If the covenants are to be general, omit the part in brackets.

Against acts of vendor and his ancestor, &c. only.

(*g*) If the covenants are restrained to the acts of the vendor and his ancestor, &c. add,

"or under the said [*ancestor, devisor, &c.*] deceased; *or* any of his ancestors;"

brances made, done, or committed by the said [*vendor*], or by any other person or persons whomsoever (claiming (*f*) under him or them (*g*) (*h*)); *And* that he the said [*vendor*], and his heirs, and all and every other person or persons, lawfully or rightfully claiming or to claim, any estate, right, title, or interest, whether legal or equitable, of, in, to, or out of, the premises hereby agreed to be conveyed, [(*f*) under or in

10. PURCHASE OF FEE-SIMPLE.

For further assurance.

(*f*) (*g*) See preceding page, 458.

(*h*) If the estate be subject to a fee farm rent, mortgage, annuity, rent-charge, or other incumbrance, [created by any person against whose acts the vendor is to covenant], it may be mentioned here; thus,

Incumbrances excepted, and to be discharged by purchaser.

"a fee farm rent payable to the lord of the manor of —— out of the said premises only excepted;"

Fee farm rent.

"a mortgage of the said premises in fee, by indentures of lease and release, bearing date the —— and —— days of ——, 18—, (*or* by demise for —— years, by indenture bearing date the —— day of ——, 18—,) and made between the said [*vendor* or *mortgagor*] of the one part, and [*mortgagee*] of &c., of the other part, for securing the payment of the sum of £—— and interest only excepted: *And* which sum of £——, and the interest thereon from the —— day of —— now next, it is hereby agreed shall be paid and discharged by the said [*purchaser*], his heirs, executors, or administrators, who shall indemnify the said [*vendor*], his heirs, executors, and administrators, therefrom;"

Mortgage in fee,

or for years.

"an annuity, (*or* rent-charge), of £——, payable to —— for his life, out of the said premises, and secured by indenture bearing date &c., and made &c., and the term, estate, and interest thereby created, only excepted; *And* which annuity (*or* rent-charge), from &c." (*as above*).

Annuity.

"other than and except such leases for twenty-one or any lesser number of years, as the said [*vendor*] hath already granted of the said premises, or any part thereof, at full improved rents reserved, to be payable yearly or oftener, during the continuance of the estates granted by the same leases respectively; (*or* the leases and agreements in writing for leases of the present tenants or occupiers of the said premises); *And* the terms, if any outstanding, in trust for the said [*vendor*], his heirs, appointees, and assigns."

Leases.

Agreements for leases.

Outstanding terms.

[As to what attendant terms, &c., should be noticed as incumbrances, *vide infra*, Vol. 7, p. 520, 2nd Ed.; Vol. 8, p. 223, 1st Ed.]

10. PURCHASE OF FEE-SIMPLE.

trust for him or them (*k*), will and shall, at the request, and expense of the said [*purchaser*], his heirs or assigns, make, do, and execute any act, for better conveying and assuring the premises so agreed to be sold and conveyed as aforesaid, unto or to the use of the said [*purchaser*], his heirs, appointees, or assigns, for ever; so as that such further assurances contain no further covenants than against the person or persons who shall be requested to make the same, or against his, her, or their heirs; and so as that the party or parties who shall be requested to make such further assurances be not compellable to travel from the usual place of his, her, or their abode for the doing thereof (*l*). AND IT IS HEREBY

Covenants extended to acts of vendor's ancestors.

(*k*) If the covenants are to extend to the acts of the vendor's ancestors, &c. add,

"or under or in trust for any of his ancestors;"

Purchaser entitled to attested copies of title-deeds, and covenant to produce the originals.

(*l*) If the premises are part of a larger estate, or part of a family estate, and it is probable that the title-deeds also relate to property of greater value, it may be prudent to insert the following provision; although, in the absence of an express stipulation to the contrary, the vendor would be liable to the expense of attested copies, not of all the deeds, but only so far back as to make a title. *Dare* v. *Tucker*, 6 Ves. 460; and as a necessary consequence, it seems, the expense of the deed of covenant to produce the originals. *Berry* v. *Young*, 2 Esp. 640, n.

Vendor to retain title-deeds, and at his own expense deliver attested copies and covenant to produce originals.

"AND IT IS HEREBY AGREED, by and between the said parties, that such of the title-deeds or writings concerning the said premises, as shall be found to relate to other property of the said [*vendor*], of equal or greater value, shall be retained by him on his delivering, at his own expense, true and attested copies of them, duly stamped; and on his entering into the usual covenant, to be prepared, by and at his own expense, for producing the originals; but such covenant nevertheless to be void, if the said [*vendor*] should afterwards sell any part of the property retained by him, and deliver the same deeds and writings to the purchaser thereof, and procure such purchaser to enter into the same or the like covenants."

If the premises sold constitute the larger part of the estate to which the title-deeds relate, say,

Purchaser to have title-deeds, but vendor to have copies,

"AND IT IS HEREBY AGREED by and between the said parties, that such of the title-deeds or writings concerning the said premises, as shall be found to relate to other property of

AGREED, by and between the said parties, that all arrears of rent and other profits arising from the said estate and premises, or any part thereof, which now are, or which on or before the said —— day of —— now next, shall occur, accrue, or become due, shall belong to, and be received by, the said [*vendor*], his heirs, executors, or administrators; *And* that he and they shall have full power and free liberty to get in and receive the same accordingly. [AND IT IS HEREBY AGREED AND DECLARED between and by the said parties to these presents, that so much of the expenses attending the soliciting, obtaining, and passing, of an act of Parliament, made and passed in the —— year of her present Majesty's reign, intituled, "An Act for dividing, allotting, and inclosing a certain large open tract of land within the manor of ——, in the county of ——;" the surveying, planning, dividing, and allotting of the said tract of land, and the preparing, making, and enrolling of the general award of the

10. PURCHASE OF FEE-SIMPLE.

Vendor to receive rents to a given time.

Purchaser to pay the expenses of an inclosure act.

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the said [*vendor*], of inferior value, shall be delivered to the said [*purchaser*], and the said [*vendor*] shall be entitled to have, at his own expense, such copies of them, either examined copies unstamped, or attested copies, duly stamped as he shall think fit; and also the usual covenant by the said [*purchaser*] for producing the originals, to be prepared by and at the expense of the said [*vendor*]; but such covenant nevertheless to be void, if the said [*purchaser*] should, &c." (*as above.*)

and a covenant to produce them at his own (expense).

If the premises be subject to a mortgage, or any other incumbrance, in order to save the purchaser the expense of a long conveyance, it is the usual practice to add a similar provision to the following:—

"AND IT IS HEREBY FURTHER AGREED by and between the said parties, that if the said premises be subject to any incumbrance, it shall either be paid off or otherwise satisfied by the said [*vendor*], and the said premises at his own expense be effectually released and discharged therefrom, previously to the conveyance to the said [*purchaser*]; or such release or discharge shall be made by separate and distinct deed or deeds, to be prepared by and at the expense of the said [*vendor*], and to be approved by the counsel or solicitor of the said [*purchaser*] at his own expense, but the execution thereof to be attested by the solicitor or agent of the said [*purchaser*], at the expense of the said [*v endor*]."

Vendor to be at the expense of deeds discharging incumbrances.

10. PURCHASE OF FEE-SIMPLE.

commissioners in and by the same act named and appointed, in pursuance of the said act, and the instruments of election in the said act mentioned, and of all other the charges and expenses attending the execution of the said act, as shall be or become payable, for or on account of any allotment of the said tract of land, for or in respect of the said premises hereby agreed to be sold and conveyed by the said [*vendor*] as aforesaid, shall be borne and paid by the said [*purchaser*], his heirs and assigns.] IN WITNESS &c. (*m*).

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(*m*) [A sketch of the provisions of the general inclosure act, and a notice of some of the points decided on the construction and effect of inclosure acts in general, may be useful.

General Inclosure Act, 41 Geo. 3, c. 109.

Sections 1 & 2 of the general act relate merely to the oath of the commissioners, &c.; and the disqualification to purchase lands in the parish for five years*.

Parish boundaries, &c.

Sect. 3 empowers commissioners to fix parochial boundaries, gives a right of appeal to the quarter sessions, and declares the judgment of the sessions to be final†.

Survey and valuation.

Sect. 4 directs the commissioners to make a survey, admeasurement, plan, and valuation of the lands to be inclosed, and of the ancient inclosed lands within the parish or manor, distinguishing each proprietor's property; which survey, &c., are to be kept by the commissioners, and all persons interested are at all reasonable times to have liberty to peruse and inspect the admeasurement and plan only, and to take copies thereof and extracts therefrom.

Sect. 5 empowers commissioners to enter lands for the purpose of making the survey.

Claims to allotments.

Sect. 6 requires claimants to allotments within the time prescribed

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Emolument of appointment, and oath of commissioner.

*[The first section directs that the oath subscribed by the commissioners, and the appointment of any new commissioner, shall be annexed to, and enrolled with the award; and makes a copy of the enrolment evidence. This enactment is directory merely, and where the oath and appointment of a new commissioner had not been annexed to and enrolled with the award, (which recited that the oath had been taken), it was held, that a purchaser could not object to the title under the award. *Casamajor* v. *Strode*, 5 Sim. 87; 2 Myl. & K. 708. Sir *L. Shadwell*, V. C., said—"The act merely directs certain acts to be done, and that a certain matter pointed out by the act of Parliament shall be evidence that those acts were duly performed; but it does not say that no other evidence of the acts having been duly done shall be receivable ..... By the recitals of the award in this case, everything appears to have been rightly done, and my opinion is, that, if these recitals had not been contained in the award, a Court of law would have been bound to presume, in the absence of any evidence to the contrary, that the acts required to be done had been rightly and duly performed."]

† [See *Rex* v. *Marsh*, 6 Nev. & M. 668; 3 Ad. & El. 468.]

Stat. 41 Geo. 3, c. 109.

by the commissioners to deliver a schedule of the lands in respect of which they claim, describing them, and naming the person in actual possession, and their computed quantities; stating also the rights, estates, and interests of the claimants, and distinguishing the freehold from the copyhold or leasehold; in default of which they are to be excluded from all title to allotments. The claims are, before the award, to be open to the inspection of parties interested, and any objections made thereto must be presented at a meeting, appointed for the purpose*.

Commissioners not to settle disputes as to title.

Sect. 7, Commissioners not authorised to determine disputes touching the right or title to any lands, but to set out the allotments to the persons in actual possession of the lands in lieu or right whereof the allotments shall be made; and no suit touching such title to delay the division or inclosure.

Roads, &c.

Sects. 8, 9, and 10 relate to the disposition of roads; the hearing of objections; the stopping up of old roads; the preventing persons from erecting gates across a road, or planting trees on the sides, at less than fifty yards; the appointment of surveyors, and the levying of rates†.

Herbage on roads.

Sect. 11 declares that, after the setting out and making of the roads, the grass and herbage arising therefrom shall belong to the proprietors of the adjoining lands‡, and all roads, ways, and paths not set out to be

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Time for making claims.

* [J. This section has been held not to be confined to persons entitled to commonable rights, but to extend to an owner of tithes, and who therefore forfeited his title to an allotment by his neglect to present his claim at the meetings held by the commissioners for the purpose of receiving claims. *Doe* d. *Watson* v. *Jefferson*, 9 J. B. Moo. 260; 2 Bing. 118. But see *post*, p. 474.J.]

† [J. See *Harber* v. *Rand*, 9 Price, 58: *Logan* v. *Burton*, 5 B. & Cr. 513; 8 D. & Ry. 299.J.] [The execution of the award does not put an end to the powers of the commissioners to complete roads, make rates, &c. *Haggerstone* v. *Dugmore*, 1 B. & Al. 82]

Waste lands by the road-side belong to the owners of the adjoining lands.

‡ [J. It is a presumption of law, that the small pieces of waste or uninclosed land, frequently found by the road-side, belong to the owner of the inclosed lands next adjoining. Thus, in a case at *Nisi Prius*, where the question raised in an action of trespass was, whether a small piece of land adjoining the high road leading from Hampstead to London, which had been inclosed by the plaintiff, who claimed under the lady of the manor of Hampstead, belonged to him or to the dean and chapter of Westminster, the owners of the adjoining freehold lands Lord *Tenterden*, in the course of his address to the jury, observed—"In some of the more antient books of law, a difference of opinion appears to have existed as to the right to the waste lands adjoining to public highways; but, as far as my own experience goes, and I have heard the opinion of many learned judges upon the subject, it has uniformly been laid down, that land under such circumstances is presumed in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor; but a presumption prevails only so long as proof to the contrary is wanting; and the question is, whether the plaintiff has, in the present instance, rebutted this presumption to your satisfaction

INCLOSURE.

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extinguished, but turnpike roads not to be altered without the consent of the trustees*.

Waste strips by roads.

satisfaction. In remote and antient times, when roads were frequently made through uninclosed lands, and when the same labour and expense was not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law, that the public, where the road was out of repair, might pass along the land by the side of the road. This right on the part of the public was attended with this consequence, that, although the parishioners were bound to the repair of the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the *onus* of repairing the road. If the same person were the owner of the land on both sides, and inclosed both sides, he was bound to repair the whole of the road; if he inclosed on one side only, the other being left open, he was bound to repair to the middle of the road; and where there was an antient inclosure on one side, and the owner of lands inclosed on the other, he was bound to repair the whole. Hence it followed, as a natural consequence, that when a person inclosed his land from the road, he did not make his fence close to the road, but left an open space at the side of the road to be used by the public, when occasion required. This appears to be the most natural and satisfactory mode of explaining the frequency of wastes left at the sides of roads; that the object was to leave a sufficiency of land for passage by the side of a road, when it was out of repair, is the general presumption of law; but this presumption is capable of being rebutted; and here the plaintiff undertakes to rebut it; he says that Lady Wilson is lady of the manor of Hampstead, and that she, as lady of the manor, is empowered by immemorial custom within the manor, to grant out waste lands with the consent of the copyholders of the manor. This cannot be done without a special immemorial custom to warrant it, since a copyhold tenure cannot have been created within time of memory." His Lordship then commented on the evidence supplied by the different grants of waste under the manor of Hampstead, observing that, out of the ten grants which have been proved, some of which

Right to stop ways.

* [J. *Vide The King* v. *Commissioners of Dean Inclosure*, 2 M. & S. 82. An allottee may stop up a private right of way not noticed or set out in the award, without any express authority from the commissioners, though no other road is appointed in lieu of it. *White* v. *Reeves*, 2 Moore, 23. See also *Pick* v. *Clarkson*, 2 W. Blackst. 1318.J.] But where a footway passed partly over antient inclosures, and partly over waste lands into the public highway, and an act for inclosing the wastes contained no power to stop up ways, leaving the matter to be regulated by the general act, it was held, that as the 8th sect. of the general act restrained the commissioners in such cases from stopping any old road, leading through old inclosures, they could not stop up that part which led over the wastes, which in effect would be to stop up the way altogether. *Thackrah* v. *Seymour*, 1 Cr. & Mee. 20. As to the mode in which powers of setting out roads, &c., given by local acts to private individuals should be exercised see *Alson* v. *Fenton*, 1 B. & Cr. 195.]

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Sect. 12 directs commissioners in making allotments to pay regard to the situation and convenience of the houses or homesteads of the proprietors.

Stat. 41 Geo. 3, c. 109.

which were of pieces of land between the road and copyhold land, and others (three in number) of parcels of land between the road and freehold lands, the latter were the only ones which were material for consideration, since, as to the wastes between the road and the copyhold lands of the manor of Hampstead, no doubt could arise as to the right, and it was only in respect of the parcels between the road and the freehold lands that the presumption applied. The jury found a verdict for the defendant; and, it should seem, on the ground that sufficient evidence had not been adduced to rebut the presumption in question. *Steel* v. *Prickett*, 2 Stark. 463. J.]

[J. And this presumption exists as well where the adjoining lands are copyhold, as where they are freehold. Thus, where an ejectment was brought to recover a cottage, which had been built on a slip of waste land adjoining to the close of one of the lessors of the plaintiff, which was copyhold, the jury gave a verdict for the plaintiff; and the Court discharged a rule *nisi* for entering a nonsuit, being of opinion that the rule applied though the adjoining lands were of copyhold tenure. Mr. Justice *Bayley* said—"It is a *primâ facie* presumption that waste land on the sides, and the soil to the middle, of a highway, belong to the owner of the adjoining freehold land. The rule is founded on a supposition that the proprietor of the adjoining land, at some former period, gave up to the public, for passage, all the land between his inclosure and the middle of the road. I think that rule applies not only to freehold, but to copyhold lands also. There was no evidence to shew when the road was first made; but it was a turnpike road. If the road existed at the time when the copyhold was first granted, *viz.* from time immemorial, the right of property in the road, and the waste adjoining, might in that case have remained in the lord. But if the road were taken out of the land after the copyhold was granted, then the presumption would be, that the property in the road and the waste adjoining was in the copyholder. Now, I think that we ought not to presume that the road in question was made before the time of legal memory. The probability is, that it was made long since. And if the road was made within the time of legal memory, then the *primâ facie* presumption is, that the waste land adjoining the road belonged to Roberts, the copyhold tenant of the land next adjoining, and not to the lord. The rule for entering a nonsuit must, therefore, be discharged." *Doe* d. *Pring* v. *Pearsey*, 7 Barn. & Cr. 304. The presumption in question, however, does not obtain where the slips of land adjoining the road are contiguous to, or communicate with, open commons, or other larger tracts of land; for, in such case, it is rather to be inferred that the ownership of the larger piece of land applies also to the slip. *Grose* v. *West*, 7 Taunt. 39. And evidence of acts of ownership exercised by the lord of the manor over other slips of land similarly situated within the manor is admissible in support of his claim. *Doe* d. *Barrett* v. *Kemp*, 5 Moo. & Pay. 173.] [Affirmed, 2 Scott, 91. *Vide ante*, p. 79.]

Rule applies where the adjoining land is copyhold.

Presumption that a road was made *within* the time of legal memory.

[Every

INCLOSURE.

Stat. 41 Geo. 3, c. 109.

Sect. 13 enables them, on the application of parties, to lay together small allotments, to be stocked and depastured by the proprietors in common.

Sect. 14 declares that the several shares, when allotted, shall be in full satisfaction of all previous rights in the allotted lands; and immediately after the making of the allotments and the execution of the award, or from some other time to be ascertained by a notice fixed on the church door, all rights of common, &c. shall be extinguished.

Exchanges.

Sect. 15 empowers the commissioners to allot *any* hereditaments within the parish in exchange for other lands within the parish or any adjoining parish, such exchanges to be made with the consent of the proprietors, or of the husbands, guardians, trustees, committees, or attornies of such of them as are under coverture, or under any other incapacity, or absent beyond the seas. Exchanges to be specified in the award; and where made of church lands, to be with the consent of the bishop of the diocese and the patron.

Partition.

Sect. 16 enables commissioners to make partition between joint tenants and tenants in common, upon the request in writing of them, or any or either of them, or of the husbands, guardians, trustees, committees or attornies of such as are under coverture or any other incapacity, or absent beyond the seas; and to allot to them in severalty. [*Vide infra*, Vol. 6, p. 595.]

Acceptance of allotments.

Sect. 17 allows two calendar months for the proprietors to accept their allotments; in case of neglect or refusal, their rights to the allotments to be forfeited.

Sect. 18 enables guardians, husbands, trustees, committees, and attornies of incapacitated persons, and tenants for life, &c., to accept allotments; and, in case of non-acceptance, allows twelve calendar months for acceptance, after incapacities removed.

Sect. 19 allows allotments to be ditched and fenced off before the execution of the award.

Sect. 20 relates to trees, &c., growing on allotments.

Money paid on exchange or purchase.

Sects. 21, 22, 23 provide for those cases where money is to be paid for the purchase or exchange of any land, &c., under the provisions of the general or particular inclosure act, which money ought to be laid out in other purchases, to be settled to the same uses. A proportion of the expenses of the act is first to be deducted by the commissioners, and the surplus, if amounting to 200*l.*, to be laid out in land, and, in the mean time, paid into the bank, under the direction of the Court of Chancery; if less than 200*l.*, and more than 20*l.*, to be paid into the bank, or to two trustees, at the option of the person entitled to the rents of the lands, &c.; if less than 20*l.*, to be paid to the person entitled to the rents.

Payment of expenses, &c.

Sect. 24 provides that, in case of neglect or refusal to accept allotments, the commissioners may fence and let such allotments, and receive

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[Every inclosure made by a tenant of waste adjoining the demised land, is presumed to have been made for the benefit of the landlord. *Doe* d. *Dunraven* v. *Williams*, 7 Car. & P. 332.]

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rents, till payment of the proportion of the expenses of the act: or charge such expenses upon the proprietors. Stat. 41 Geo. 3, c. 109.

Sects. 25, 26, 27, 28 relate to the erection and maintenance of fences.

Sect. 29 authorises the commissioners, in case proprietors shall not contribute their proportion of the expenses of the act, to levy the amount by distress and entry on the allotment, and perception of rent*.

Sect. 30 enables particular tenants to charge allotments with their expenses under the inclosure. *Vide infra*, Vol. 5, p. 195; Vol. 6, pp. 223, 388, 400.

Sect. 31 enables the commissioners to deduct from the allotments to feoffees of charity or school lands, so much land as, in the judgment of the commissioners, is equal to their proportion of the expenses of the inclosure, and to award the same to persons undertaking to defray such expenses.

Sect. 32 prescribes the mode of selling allotments for payment of expenses, where any inclosure act should direct a sale to be made for such purpose.

Sects. 33, 34 relate to the means of enforcing the attendance of witnesses to give evidence.

Sect. 35 requires the award to be ingrossed or written on parchment, and read and executed at a special general meeting convened for the purpose, and to be proclaimed on the next Sunday in the parish church; after which it is declared to be complete. It is afterwards to be enrolled in one of the Courts at Westminster, or with the clerk of the peace for the county, that recourse may be had thereto by persons interested; one shilling only to be paid for inspection or perusal, and twopence per folio for a copy of any part; the copy of the award, or of any part of it, signed by the proper officer, to be admitted as legal evidence. Commissioners may annex to their award a map or plan. Award.

Sects. 36, 37 relate to the mode of keeping the commissioner's accounts, and to the deposit of monies in their hands.

Sect. 38 enables the rector or vicar of the parish, with the consent of the bishop and patron, to lease the allotment for twenty-one years, to commence within twelve months after the executing of the award; so that there be reserved to the rector or vicar the best rent without fine, and so that no lessee be made dispunishable of waste; and that, in every such lease, a power of re-entry be inserted in case of non-payment of rent; and a counterpart be executed by the lessee†. Leases of allotments to parsons.

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* [J.This power may be exercised although the commissioners have not passed their accounts before a justice of the peace, as usually enjoined by the local act; *Doe* d. *Harris* v. *Bodenham*, 9 Barn. & Cr. 495; *Smith* v. *Jones*, 1 Barn. & Ad. 328; and it applies, notwithstanding that the local act has directed part of the expenses to be raised by the sale of a portion of the lands to be allotted, leaving the deficiency only to be raised by a rate on the proprietors. *Doe* v. *Bodenham*, 9 B. & Cr. 495.J.]

[As to the personal liability of commissioners under public acts, for debts incurred in carrying them into execution, see *Horsley* v. *Bell*, 1 Br. C. C. 101; Ambl. 770: *Eaton* v. *Bell*, 5 B. & Al. 34; *Speer* v. *Crawter*, 17 Ves. 216.]

† [*Vide stat.* 1 & 2 Geo. 4, c. 23, *post*, p. 478.]

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Stat. 41 Geo. 3, c. 109.

Sect. 39 relates to the recovery and application of penalties.

Sects. 40, 41 save the rights of lords of manors, and all other rights except the rights intended to be barred and extinguished.

Sects. 42, 43 empower justices to take affidavits, and declare persons forswearing themselves guilty of perjury.

Sect. 44 provides that the directions in this act shall be only so far binding as any of them shall not be otherwise enacted in any future act.

The schedule of the act contains the forms of affidavits, of notices, consents, allegations, and admeasurements.[J.]

Object of the General Inclosure Act.

[J. The object of the General Inclosure Act was to simplify and shorten local acts, by creating general provisions applicable to all ordinary cases. The local acts, however, are frequently framed so as to be complete in themselves, without having recourse to the general act, even where they do not materially vary the enactments.[J.]]

Question as to the power of two surviving commissioners.

[J. Where three commissioners are appointed, the acts of two surviving commissioners alone, without any new appointment in the room of a deceased commissioner, under a power to that effect in the act, is invalid, notwithstanding a provision that the acts of any two of the commissioners should be good. *Ante*, p. 83.[J.]]

Commissioners must pursue their authority.

[J. Commissioners must strictly pursue their authority. If they manifestly violate the directions of the act from which that authority is derived, their award, in such particular at least, will be inoperative*.

Presumption that commissioners have acted regularly.

* [The general rule is, that when a person is required to do an act, the not doing of which would make him guilty of a criminal neglect of duty, it shall be intended that he has duly performed it, unless the contrary be shewn. *Williams* v. *East India Company*, 3 East, 192. But where an inclosure act authorised the commissioners to ascertain the parochial locality of roads belonging to adjacent parishes, after having given notices to the parishes to be affected by the award; and the commissioners awarded a road to be in a different parish from that in which it was formerly situate; but the usage had been, after the award, for the original parish to repair the road as before: it was held, that that was negative evidence, that the notices had not been duly given, so that the usual presumption did not arise. *Rex* v. *Haslingfield*, 2 Mau. & Sel. 558.]

[This principle of presuming regularity in the acts of commissioners was carried to great length in the case of *Goodtitle* d. *Baker* v. *Mielburn*, 2 Mee. & W. 853, where an inclosure act authorised the making of exchanges, provided that all such exchanges were ascertained, specified and declared in the award, and were made with the consent of the owners or proprietors of the lands to be exchanged, and testified in writing under their hands. The commissioners, in their award directing an exchange, stated, that it was made with the consent of the mortgagor of the closes exchanged, but did not state the consent of the mortgagee. It was held, that it was unnecessary to determine whether the mortgagee's consent was necessary, because the Court had no right to presume that it had not been obtained. The commissioners were not bound to set forth in their award all the authorities they had; and the presumption was, that they acted according to this, unless the contrary appeared; and the setting forth that they had the authority of the

Thus, where the commissioners of an inclosure act were empowered to fix the boundaries of a parish,* and were to cause the boundaries so fixed to be inserted in a newspaper, and described in the award, and which were then declared to be final, a variation being discovered to exist between the boundaries advertised in the newspaper, and those mentioned in the award, it was held, that the award was not conclusive as to the boundaries. *Rex* v. *Washbrook*, 4 B. & Cr. 732; 7 Dowl. & Ry. 221.[J.]

As to the allotment to the lord.

[J. Inclosure acts usually direct some share, often one-sixteenth in value, of the waste to be allotted to the lord of the manor; and it has been decided, that to entitle him to this allotment, it is not necessary that he should adduce evidence of the existence of the manor; for it is considered as made in right of the soil, of which, in this instance, the claimant was admitted to be owner. *Smith* v. *Smith*, 2 Price, 101.[J.]] [A lord of a manor is entitled to an allotment in respect of his demesne lands, in addition to the allotment in respect of his right as lord of the manor, although the act only provides for his compensation as lord. *Arundel* v. *Lord Falmouth*, 2 Mau. & S. 440. But if the act had directed the residue to have been divided among *the other* proprietors, it would have been different. Ib. The lord is not entitled to an allotment in respect of land approved (*i. e.* inclosed) by him before the general inclosure. *Costard and Wingfield's case*, Godb. 96. There may be distinct rights, in different manors, appertaining to one tenement. *Hollingshead* v. *Walton*, 7 East, 485.]

Casamajor v. *Strode.*

[In *Casamajor* v. *Strode*, 2 Myl. & K. 706, an inclosure act, after reciting that the defendant, as lord of the manor of N., was entitled to the soil and royalties within the manor, and, as lay rector, was entitled to tithes, and that he claimed right of common in respect of the said soil and royalties on the waste land and common, directed the commissioners to award to the defendant, as lord of the manor, an eighteenth part of the residue of the wastes as a compensation for the soil of the wastes, and an eighth part as an equivalent for his right of common, and a compensation for his impropriate tithes; and to divide the residue among the defendant and other persons having rights of common. By the saving clause, the seignory and royalties were reserved to the lord. The commissioners made four distinct allotments to the defendant. The first, in compensation for his right of *warren;* the second, for his right to the soil; the third for his tithes; and the fourth for his rights of common. It was held, by Lord *Brougham*, C., with the assistance of *Tindal*, C. J., and *Bosanquet*, J., (reversing a decision of the Vice-Chancellor, 5 Sim. 87), that the defendant had not a marketable title to the allotment

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the mortgagor did not preclude the presumption that they had also that of the mortgagee. There was *primâ facie* evidence that he did consent in the fact, that the mortgagor took the exchanged lands, and possessed and enjoyed them for many years; and in a letter from the mortgagor to the mortgagee, referring to the transaction. See also *Rex* v. *Marsh*, 6 Nev. & M. 668; 3 Ad. & El. 468.]

* [See *Rex* v. *Bury St. Edmunds*, 4 B. & Al. 462: *Casamajor* v. *Strode*, 2 Myl. & K. 706.]

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in respect of his right of warren. Lord *Brougham*, C., after observing that the lord's right of warren was a royalty, and that the commissioners had no direct authority under the act to give an allotment as a compensation for a royalty, said—"But it has been argued on the part of the sellers that it is not necessary to consider the warren as a royalty, but that it may be well understood to mean, in common parlance, a place in which rabbits or other animals of warren are kept. It does not, however, appear to us that the difficulty is removed by such an interpretation. For if the word 'warren' is used by the commissioners in their award, as applied to a portion of the common or waste land in which the lord of the manor claimed and exercised the right of having rabbit burrows on the surface, the soil of such common or waste land being already in the lord, it is still necessary to shew under what power in the act the commissioners extinguished the right of the other commoners over this part of the common; for the award cannot give a title to allotments in respect of rights which are not authorised to be extinguished under the powers conferred by the act."]

["The decision, therefore, of the Court of Common Pleas in the case of *Phillips* v. *Maile*, 7 Bing. 133; 4 Moo. & P. 770, does not apply to the present case. In that case no other point was decided, than that it was unnecessary for the party who claimed a right of common which had been allotted to him by the commissioners, under an inclosure act over a certain limited inclosure, as a compensation for a right of common over a larger waste, to state in his pleadings his title to his original right of common; for as such title had not been disputed in the mode prescribed by the act, it was held, that it must be taken to be admitted by all who were parties to the award. But here the objection is widely different; it lies upon the surface of the award, the commissioners having adjudicated an allotment in respect of a right for which the statute gave them no authority to grant any compensation. It appears, therefore, that the allotment as a compensation for the right of warren is to be considered as if the portion of waste land, whereof it consists, had not been allotted at all; and if this were the case the defendant, in respect of his right of soil, would be entitled to one-eighth part only of the 102 acres comprised in that allotment, in respect of his impropriate tithes, and the proprietors having right of common (including the defendant) to all the rest."]

["It may be said, that the defendant's right to the soil having existed before the act of Parliament, his title to the soil is independent of the award, and that all rights of common over it have been extinguished by the compensation received by the commoners under the award. But if the commoners, on their part, have received compensation for all their rights of common over the 102 acres in question, the defendant has also on his part received compensation for all his right of soil in the same portion of the waste. The compensation to both, however, has been made out of a fund, a portion of which remains undisposed of by any legal authority."]

Deficiency of quantity no evidence of deficiency in value.

[J. Where commissioners of inclosure are directed to allot a certain aliquot share, *in value*, of the wastes to the lord or the owner of tithes, or of any other right or interest, the insufficiency of the allotment is

not shewn by the fact that it contains less than the specified proportion, as the deficiency in quantity may have been compensated by superiority in value. It should seem, however, that it is not in general open to parties to call in question the adequacy of an allotment, and on that ground to set up a right, in compensation for which the allotment was professed to be made, that being a matter confided, unreservedly, to the judgment and discretion of the commissioners; though, if they have, not merely a defective allotment, but no allotment whatever in satisfaction of a right recognised by the act, the case is different; the right then remains unextinguished. Thus, where, under an inclosure act, which provided that two-fifteenths in value (quantity, quality, and situation considered) of the titheable grounds should be allotted to the rector of A. in lieu of tithes; and it was declared, that, after the enrolment of the award, all tithes should cease: the commissioners awarded certain lands to the rector in lieu of the tithes in two townships, but made no mention whatever of a third township, over which the rectory extended, and the tithes in which were now claimed by the rector, on the ground of the insufficiency of the allotment, the quantity being less than the two-fifteenths of the lands in the three townships, and the award not expressing the allotment to be made in lieu of the tithes of the third township; and as to which, therefore, it was contended there was no award, and, by necessary consequence, no extinguishment of the tithes. Sir *T. Plumer*, M. R., held, first, that the deficiency of quantity was no evidence of inadequacy in value, as the commissioners were directed to take into their consideration quality and situation as well as quantity; secondly, that though on the face of the award there was no reference to the tithes in the third township, yet that it could not be said that no regard was had to that township, for an allotment was expressly made of a piece of land there; and, thirdly, that even if an omission of a proper allotment had been proved, yet the act rendered the award conclusive. "The commissioners," the Master of the Rolls observed, "are directed to allot to different individuals, and, having finished the allotments, to draw up their award; which is an instrument recording their judgments antecedently pronounced, good or bad; if the instrument contains that, it is the award; on the enrolment of that instrument the tithes cease. Is not this the award? and has it not been enrolled? The vice of the argument consists in the assumption, that because error can be proved in an allotment there is no award. The act, intending to terminate all litigation, to define interests, and to extinguish rights to common and to tithes, on that event directly puts an end to the claim to tithes. *It is quite clear that, whatever error there might be in the previous allotments, the existence of the award concludes the question.*" *Cooper* v. *Thorpe*, 1 Swanst. 92; 1 Wils. 55. Against his Honor's decree an appeal was made to the Lord Chancellor, who directed an action to be brought in the King's Bench; when that Court came to a different conclusion from the Master of the Rolls, being of opinion that the rector was still entitled to his tithes in that township for which no allotment was made in the award; for an allotment being expressly made in lieu of the tithes in two townships and not in the third, the rule *expressio unius est exclusio alterius* applied. Upon these grounds the Court was of opinion that the rector came within the sav-

Discretion of commissioners.

Cooper v. *Thorpe.*

Rights in respect of which no allotment is made are not destroyed.

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ing clause of the act, (which, it was observed, had not been brought to the attention of the Master of the Rolls), which saved the rights of all persons, except those to whom any allotment or compensation should be made by virtue of the act. *Cooper* v. *Walker*, 4 Barn. & Cr. 36; 6 Dowl. & Ryl. 31. A writ of error was afterwards brought in the Exchequer Chamber, when the judgment of the Court of King's Bench was affirmed by the unanimous opinion of all the judges. *Thorpe* v. *Cooper*, 2 Moore & Pay., 248; 2 You. & Jerv. 445.[J.] [Upon the hearing for further directions, the verdict was adopted by the Lord Chancellor. *Cooper* v. *Thorpe*, 2 Russ. 78.]

Saving clause rejected for repugnancy.

[J.Too much importance, however, must not be attached to the saving clauses in such acts; for, if the saving clause be repugnant to, and would destroy the effect of, a prior enacting clause, it will be rejected: and therefore, where in an inclosure act it was directed that certain allotments, which the commissioners were authorised to sell in order to defray expenses, should be enjoyed free from tithes, and the act contained a clause reserving the rights of all persons other than the lord of the manor and persons entitled to a right of common, it was held that the tithe-owner was deprived of his tithes in the allotments in question. The Chief Baron (*Macdonald*) observed, that the case fell within the general rule, that a saving repugnant to a proviso of the instrument is void. *Riddell* v. *White*, 1 Anstr. 281.J.] [In that case it was said, that inclosure bills are not to be considered as merely private acts; but see *Willis* v. *Pearcey*, 1 Scott, 426.]

Clause restrained by the context.

[J.Indeed, clauses or expressions in any part of the act will be restrained to a consistency with the context, in deference to the evident design of the legislature; though, considered *per se*, they might seem to be susceptible of a wider construction: and, therefore, where it was

Manorial rights of the lord.

enacted that the commissioners should allot, for the benefit of such persons as they should determine to be entitled to a right of common therein, a certain commonable place, and which should for ever thereafter be used and enjoyed as a common pasture by the persons so determined to be entitled to the right of common thereon, *exclusive of all others whatsoever;* it was held, that, notwithstanding the generality of these words, the allottees took the common subject to the lord's right to dig stone, as the clause in question referred solely to the commissioners' power of adjudication among the commoners, and was not intended to exclude the manorial rights of the lord. *Place* v. *Jackson*, 4 Dowl. & Ry. 318.J.] [See *Townley* v. *Gibson*, 2 T. R. 701; and *infra*, Vol. 4, p. 669.]

As to an allotment made to a fluctuating unincorporated body of persons.

[J.If an allotment is warranted by the act which directs the inclosure, it is no objection to its validity, that it is made to persons to whom the inheritance could not have been conveyed by an ordinary conveyance, being a fluctuating body, having no corporate character. And, therefore, where commissioners were empowered to allot parcels of land for digging stone for the repairs of the public roads, and it was declared that the herbage of the parcels so set out should remain to the use of such persons as the commissioners should appoint, and the commissioners allotted certain parcels for this purpose, and awarded the herbage of the allotment *to the surveyors of the highways and their*

successors for the time being, to be let and disposed of in aid of the highway-tax. It was contended, that the allotment to the surveyors and their successors was void in law, they not being a corporation, and therefore incapable of taking by way of grant by that description in perpetuity: but the Court held that the objection was untenable. Lord *Ellenborough*, C. J., said—"If the act itself had directed the herbage to be taken by the surveyors of the highways for the time being, would it not have been binding upon all persons? And this is the same in effect; for the act empowers the commissioners to do that which itself might have done. The surveyors for the time being do not take by way of grant, but by way of parliamentary declaration, designating the persons who are to take and enjoy the herbage. By analogy to a common law conveyance, the objection would be good; but here they claim under the act. That which has been done through the instrumentality of the arbitrators is the same as if directed specifically by the act; as if the award had been set out in the act. If they have allotted the herbage only, the lord of the manor in whom the fee of the soil is will be a trustee for the surveyors of the time being as to the herbage." *Johnson* v. *Hodgson*, 3 East, 38.[J.]]

As to the award being conclusive.

[[J.] Where commissioners are empowered to investigate and determine any rights or claims, their award is, in that respect, final and conclusive; *à fortiori*, if the act contains, as it commonly does, an express declaration that the award shall be final, subject to a right of appeal, restricted to a certain period, after the expiration of which it is clear that an objection cannot be entertained.[J.]]

[[J.] Thus, where the commissioners were authorised to inclose and divide lands, and were directed to allot one-twentieth of the waste to the bailiff, assistants, and commonalty of G., as lords of the manor, and they were also empowered to leave certain commons uninclosed, and to define the commonable rights of the proprietors in them; and it was declared, that any person dissatisfied with the determination of the commissioners might bring an action upon a feigned issue within three months, and that the determination of the commissioners touching any claim to the soil of the wastes, and to any rights in or over the lands to be divided, should otherwise be final. It was held, that it was not incumbent on a person who claimed under the award a right of common as occupier of a messuage (and to whose claim it seems to have been objected that he was not a freeman of G.) to shew any previous right, as the act made that award conclusive. It had been contended that the corporation were not privies to the act, and were not bound by it, but came within the saving clause. The Court, however, was of opinion that, as an allotment was made to them in satisfaction of their manorial rights, they were not only privies, but parties to, and were clearly bound by, the act. *Phillips* v. *Maile*, 4 Moo. & Pay. 770; 7 Bing, 133.[J.]] [But see *Goodmanchester* v. *Phillips*, 2 Nev. & M. 713, upon the same act, which directed a common pasture to be set out in compensation for the rights of common of all the owners of commonable messuages or cottages, for such messuages or cottages only; which should be held, used, and stocked, and enjoyed by such owners or proprietors, and their respective tenants and occupiers of the said messuages or cottages only,

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Conclusiveness of award.

as a common pasture, in such manner as the commissioners should direct. The commissioners allotted a common to be used, stocked, and enjoyed *by the owners and proprietors of commonable messuages*, and their respective tenants and occupiers of the said messuages only, having right of common. The right of common previously to the act had been in the occupiers of commonable messuages, *being freemen of G.* It was held, that the award did not purport to give, and that the act did not authorise the commissioners to give, any right of common to occupiers of commonable messuages who were not freemen of G. Lord *Denman*, C. J., in delivering the judgment of the court, observed, that the point on which the decision was made, was not in *Phillips* v. *Maile* brought so distinctly to the notice of the Court of Common Pleas either in the pleadings or in the argument. See *Attorney-Gen.* v. *Gauntlett*, 3 You. & J. 93.]

Time for appealing.

[Where an act for inclosing lands and extinguishing tithes in a parish directed the commissioner to value the tithes, as being equal to a fixed proportion of the net annual value of the lands, and then to find an equivalent corn rent, and by his *award, or some previous writing* under his hand, to be *annexed thereto*, to set forth the same, and to apportion the corn rent upon the lands of the respective proprietors, and to fix when the first payment of the corn rent should be made, and when the tithes should be extinguished; and the act authorised persons aggrieved by anything done in pursuance of that act to appeal to any quarter sessions held within four months next after the cause of complaint should have arisen; and the commissioner determined the amount of the corn rent, and the time for the first payment, and the extinguishment of the tithes, by a writing which was subsequently annexed to the award; it was held, that an appeal against the rent was inadequate, made after four months from the date of such *previous writing*, was too late. *Rex* v. *Nockolds*, 3 Nev. & M. 334.]

Situation of persons who do not claim in time.

[J. The General Act (section 6, *ante*, p. 463), extinguishes the rights of persons who do not claim allotments within the time prescribed by the commissioners; and this was held to apply to the owner of a moiety of the tithes in certain lands, who allowed all the commissioners' meetings for receiving claims to expire without presenting any claim to an allotment in respect of his moiety; in consequence whereof an allotment was made to the owner of the other moiety for the *whole tithes*. It does not appear that the allottee assumed to be the owner of the entire tithes; but the commissioners, in making the allotment, conceived him to be entitled to the whole. Before the execution of the award, the other tithe-owner (or rather his grantee) brought an ejectment against the allottee for a moiety of the tithe allotment; but it was held, that the action could not be sustained, the claim being precluded by the 6th section of the General Inclosure Act. *Doe* d. *Watson* v. *Jefferson*, 9 J. B. Moore, 266; 2 Bing. 118. This is a strong decision. It may be doubted whether the legislature intended more by the provision in question than to preclude a person who was too late in his application for an allotment from opening the inclosure, or, in other words, from carrying in his claim to the commissioners for an allotment after the expiration of the period fixed for receiving claims, which

Remarks upon the case of *Doe* v. *Jefferson*.

would be attended with much inconvenience. It is, however, quite another thing to say, that the enactment is a bar to a claim by one joint-proprietor against a co-proprietor, who had, by the laches of the former, improperly received an allotment in respect of the entirety of their common property. The application of the statute to such a case, renders it a most summary statute of limitations. The principle of the case is extremely questionable.J.]

[J. At all events, it is clear that a remainderman is not excluded by his omitting to present any claim in respect of his remainder, as the tenant in possession is the person to whom the allotment is to be made, and who, for this purpose, represents those whose estates are posterior to his own. If, therefore, an allotment is made to a tenant for life, it will, under the provision invariably inserted in inclosure acts, that the allotted lands shall be subject to the uses affecting the lands in respect of which the allotment is made, inure to the use of the remainderman, who may recover it by ejectment, on the decease of the tenant for life, though the allotment was made to the latter in general terms, and not on behalf of the ulterior owners. Thus, where certain copyhold tenements had been granted by the Dean and Chapter of W. to A., B., and C., for the term of their lives successively, and A. was in possession under this grant, when an act was passed for inclosing certain moors and commons in the parish, which authorised the commissioners, in the usual manner, to divide the lands between the lords of the manor and the proprietors of the ancient tenements; and that, immediately after the allotment and inclosure, all right of common should cease; and the act provided that the lands to be allotted should inure to the same uses as the hereditaments in respect of which the allotment was made; though A. was then in possession of the copyhold tenements in question, yet B. made the claim to an allotment in respect of them; and the commissioners, by their award, allotted to B. and the Dean and Chapter, according to their respective interests, certain pieces of land in respect of their tenements. B. enjoyed the allotments for his life, during part of which time A. was living. After B.'s death, the present action was brought against his executors by C., the remainderman; and it was held that he was entitled to recover. Mr. Justice *Bayley* observed—"The commissioners, by the act of Parliament, have no authority to grant estates, but a mere power to allot lands to persons having copyhold estates. They are to divide, set out, allot, and inclose the moors, commons, or waste lands, unto, for, and amongst all persons or proprietors interested therein, in respect of their said old, auster or ancient tenements. They have, therefore, power only to allot to a person having an estate or interest in an ancient tenement. They had no power, therefore, to allot to B., except as a person having an interest in an estate called an auster tenement. The right of common is to be extinguished, and the commoners, in lieu thereof, are to have allotments. Each claim, therefore, must be made in respect of a particular auster tenement. If no claim be made in respect of an auster tenement, the owner of that tenement may lose his rights. But if a claim be made, the allotment ought to be co-extensive with the right appurtenant to the tenement, and ought not to be made with relation to the particular

Remainderman not obliged to make claim for allotment.

Doe d. *Sweeting* v. *Hellard.*

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Doe d. *Sweeting* v. *Hellard.*

interest of the claimant therein, as tenant for life or in reversion. The allotment should be in respect of the whole right. B. was the only person who made any claim in respect of the auster tenement in question, and an allotment was made to him in respect of that tenement. Now, he could not claim but in respect of the whole right appertaining to the auster tenement. He could not, at all events, by making a claim in respect of his particular interest only, acquire any interest in the allotment before his interest in the copyhold tenement accrued. The commissioners had no power to allot to any one, except in respect of an estate in possession. I will presume that B. acted honestly, and made a claim in his own name only, but for the benefit of all persons having any interest. That is the only way in which he could honestly make a claim. I take it, therefore, he did claim on behalf of all persons successively entitled to the copyhold estates, and, among others, of the lessor of the plaintiff. The latter, therefore, is not barred by the clause in the inclosure act, which requires claims to be made within a limited time." *Doe* d. *Sweeting* v. *Hellard*, 9 Barn. & C. 789; 4 Man. & Ry. 736.[J.]

As to exchanges and partitions under inclosure acts.

[J. In a few instances, the statutory powers conferred upon inclosure commissioners extend to purposes not immediately incidental to the division and appropriation of waste lands, which is the primary object of such acts. Of this nature are the powers to make exchanges of lands in the parish for other lands in the same or in any adjoining parish, and also to make partition between joint-tenants, tenants in common, and co-parceners. These powers are often very conveniently resorted to, where the infancy or some other incapacity of one or more of the parties interested renders it impossible to effect the object by mutual conveyances. The power to make exchanges* can, of course, only be exercised with the consent of both parties, or of the persons who are treated by the act as representing them, but the power to make partition is exerciseable on the request of *any or either* of the parties, in analogy, it should seem, to the right which one co-proprietor has to enforce a partition against the others by a judicial process at law or in equity†.J.]

Commissioners cannot be compelled to make exchanges.

[J. The duty of the commissioners in regard to powers of exchange is discretionary, as in the case of donees of such powers in a deed, and not merely ministerial, and therefore they cannot be compelled to exercise them even at the instance of all the parties, whose consent is required by the act. Thus, where the commissioners objected to make an exchange which was desired by the owner in fee of one of the estates, and the tenant for life of the other, on the ground that it would be prejudicial to the remainderman, the Court of King's Bench refused to grant a *mandamus* to compel them. It had been contended that the words "shall and may," in the exchange clause of the local act, were imperative; but it was observed in answer, that those words were imperative only when they authorised something for the public good, as a church

* See an observation as to inclosure exchanges, *infra*, Vol. 4, p. 6.

† As to partition, *vide infra*, Vol. 6, p. 595.

warden to make a rate, &c., but not so in a case like this. The Court would not grant a *mandamus* where a conscientious duty was left to the commissioners and they declared they could not perform the act required. It would be subjecting the consciences of the commissioners to a *mandamus*. *Rex* v. *Flockwood Commissioners*, 2 Chit. Rep. 252. It was held, that where commissioners were empowered to award lands in exchange for others in an adjoining parish, and also to award lands to the purchasers of allotments, they might award lands received partly in exchange for other lands, and partly for money. *Doe* d. *Lord Suffield* v. *Preston*, 7 Barn. & Cr. 392; 1 Man. & Ry. 713.[J.] Exchanges.

[Commissioners must strictly exercise powers of exchange. Where the commissioners were empowered to set out, allot, and award any lands within the parish of A. "in lieu of or in exchange for any other lands within the same parish, provided that all such exchanges should be ascertained, specified, and declared in and by the award to be made by the consent of the owners of the lands exchanged," and the commissioners awarded a certain allotment to A. B., "as a compensation for his open fields, lands, and rights of common, *and* an old inclosure given up by A. B., to *be allotted* by the commissioners in exchange," it was held that A. B. could not make a good title to the allotment. *Wingfield* v. *Tharp*, 10 B. & Cr. 785. Had the award specified the part which was given in lieu of the old inclosure, it would probably have been good, for there is no objection to several persons being parties on one side. *Infra*, Vol. 4, p. 3.]

[So, in *Cox* v. *King*, 4 Scott, 553, where the act required the exchanges to be ascertained, specified, and set forth in the award, and to be made with the written consent of the several proprietors, and the commissioners allotted to Sir H. and Lady M. in respect of an estate in the parish rented by A. W. and W. C., a close called Ludwell's, and another called Hill Close, *late W. P.'s land*; and to W. P., a proprietor of land in the parish, in respect of his freehold estate, two acres of arable called Shortlands, late a common field, and sixteen acres of old inclosure called Steart's *late Sir H. M.'s;* and did not state that the closes had been given in exchange for each other, but concluded with an approval and confirmation of the exchanges made between Sir H. M. and W. P. It was held, that W. P. could not make a good title to his allotments, although they had been in his possession for thirty-nine years since the execution of the award. There was no evidence of the consent of the parties having been given in writing, but the ground of the decision appears to have been that the exchange was not duly specified in the award.]

[As to the period when the legal title of the allottee is complete, *vide ante*, p. 79.]

[J.The fact of an allotment to a purchaser being contained in the award, clearly does not subject it to an *ad valorem* stamp, as an instrument of conveyance on a purchase. *Doe* d. *Lord Suffield* v. *Preston*, 7 B. & Cr. 392. In the case of *Doe* d. *Dixon* v. *Willis*, 3. Moo. & Pay. 24, it seems to have been considered as quite clear, that a conveyance by a trader of the lands in question, (and which also embraced his lands generally), in trust for the benefit of his creditors, passed the legal Stamp on award.

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estate in a piece of ground which had been allotted to him under an inclosure act, though the award was not executed until three years afterwards, and though it is not stated that the act contained any particular provision giving to the conveyance this operation.[J.]

Stat. 1 & 2 Geo. 4, c. 23.

Remedies and powers of allottees over their allotments before the award is executed. Renewals of church leases.

[J.The inconveniences arising from the allottee not having the legal seisin in the allotment until the execution of the award (*ante*, p. 79), which is often deferred for a considerable period after the allotments are made, have been partly removed by the stat. 1 & 2 Geo. 4, c. 23, which enables allottees who have demised allotments to distrain for rent, and also enables allottees to maintain actions for damage, and to bring an ejectment before the execution of the award. It also provides that, where leases granted by incumbents of livings under the general act, (*vide ante*, p. 467), shall determine before the effluxion of the term, it shall be lawful for them, with the consent of the ordinary and patron, to grant new leases for the remainder of the term, and under the same provisions as the former leases. The schedule to the act contains the form of an order to enable persons to take possession of their allotments, and cultivate or let the same, before the execution of the award.[J.]]

Common *pur cause de vicinage.*

[Common *pur cause de vicinage* is, not any right of feeding on the adjoining common, but only an excuse for trespass, by reason of the ancient usage, which the law allows to avoid suits which would arise if actions should be brought for every such trespass, when no separation or inclosure is between the commons. 4 Rep. 386. Therefore, where the act directed that from the time of affixing a certain notice of inclosure, all such rights of common in B. common, as the commissioner should direct, should cease and be extinguished, and if afterwards any of the commoners or any other persons should permit their cattle to depasture on the common, it should be lawful for any other of the commoners to distrain them; it was held that the cattle belonging to a commoner on an adjoining common, which was not included in the act, could not be distrained on being found on B. common after such notice, the commoners of B. not having erected fences between the commons as they were required to do by the act. *Wells* v. *Pearcey*, 1 Scott. 426.]

As to the tenure of allotted lands.

[J.Where an inclosure act does not, (as such acts generally do) direct that the allotted lands shall be of the same tenure as the lands in respect of which the allotment is made, the allotment will be freehold, though the lands in respect of which the allotment is made are copyhold; and the declaration usual in such acts, that the allotted lands shall be held to the same uses and for the same estates as the lands in respect of which the allotments are made, has no effect in assimilating the tenure. *Doe* d. *Lewis* v. *Davidson*, 2 Mau. & Sel. 175: *Doe* d. *Sweeting* v. *Hellard*, 9 Bard. & Cr. 789; 4 Man. & Ry. 736.[J.]]

Allotment, when tithe-free:

[J.It has been held, that, where the owner of an estate, and of the tithes arising therefrom, had a right of common appurtenant to the estate, and an allotment was made to him under an inclosure act in lieu of such right of common, the allottee had the tithes in the allotted lands, in like manner as he had in the commonable right before the inclosure. *Steele* v. *Manns*, 5 Barn. & Al. 22; see also 1 M'Clel. & Y. 609.[J.]]

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—when free from land-tax.

[J.So, where the allotment is made in lieu of common appurtenant to lands the land-tax of which has been redeemed, the lands allotted are also exempt; for, when the owner redeemed the land-tax, he redeemed it for the land and the right of common; and therefore, if, when the right of common was set out, the land-tax attached upon the allotment, the party would be paying double. *Boehm* v. *Wood*, 4 Turn. & Russ. 334. Where the tenement to which the right of common is appurtenant is liable to tithes, and the manor is exempt, the allotted land will be chargeable, as it follows the tenement in respect of which it is allotted, and not the manor from which it is severed. *E. of Carysfort* v. *Wells*, 1 M'Clel. & Y. 600.J.] [See *Jackson* v. *Douglas*, You. 391.]

As to rents in lieu of tithes:

[J.Where an inclosure act reserves to a tithe-owner a rent in corn or money in lieu of tithe, the rent will, it seems, be liable to the same rates and charges as the tithes for which it is substituted. On this ground it has been decided, that a person is liable to be rated to the poor, in respect of such a rent. *Rex* v. *Boldero*, 4 B. & Cr. 467; 6 D. & Ry. 557: *Rex* v. *Joddrell*, 1 B. & Ad. 403. See also *Lowndes* v. *Horn*, 2 W. Bl. 1252: *Rex* v. *Toms*, Doug. 401 : *Rann* v. *Picking*, Cald. 196.

—when exempt from parochial assessments.

The exemption must be founded, if at all, on the special provisions of the act. Where the rent was to be free from all taxes and deductions, it was held to be exempt from poor's rate. *Mitchell* v. *Fordham*, 6 B. & C. 274; 9 D. & R. 335. But where the commissioners were directed to ascertain the *net* value of the great tithes and moduses, and to affix a fair, clear, and annual rent in lieu thereof, the rent was held not to be exempt from highway rates, as the word "net" was used only as exclusive of the expenses of collecting and getting in. *Rex* v. *Lacey*, 5 Barn. & Cr. 702; 8 Dowl. & R. 457.J.] [See *Rex* v. *Nockolds*, 3 Nev. & M. 334.]

As to tithe allotments.

[J.In assessing the poor's rate for a corn rent, allowance must be made to the rector for ecclesiastical dues, but not for the expense of providing for the duties of the incumbency; and in regard to land-tax and other imposts shared in common by the rector and occupiers of land, he ought to be placed on an equal footing with them. *Rex* v. *Joddrell*, 1 B. & Ad. 403.J.]

[J.Where commissioners are directed to allot *and award* lands in lieu of tithes, and such allotments are declared to be in satisfaction of the tithes, the tithes are not extinguished by the allotment set out in lieu of tithes until the award be executed. *Ellis* v. *Arnison*, 5 B. & Al. 47. *Vide ante*, p. 79.J.]

Inclosures without the sanction of private acts of Parliament.

[A private act of Parliament is not essential to the validity of an inclosure. The lord of a manor or owner of the soil of wastes was long ago authorised to inclose or approve a portion of the wastes, if he left sufficient for the commoners; for, by the Statute of Merton, 20 Hen. 3, c. 4,

Stat. Merton, c. 4.

it was enacted, that, if upon an assize brought by the tenants of a manor for their common of pasture, it was found that they had as much pasture as sufficed to the tenements, together with free egress and regress from their tenements to the pasture, they should be contented therewith. This enactment applied only to common appendant; but

Stat. Westm. 2nd, c. 46.

by the Statute of Westminster 2nd, 13 Ed. 1, c. 46, it was extended

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Approvement of common.

to neighbours and such as claimed common of pasture appurtenant to their tenements, but not to such as claimed common by special grant or feoffment. And the same statute authorised inclosure for the erection of windmills, sheepcotes, dairies, or enlargement of a court or necessary curtilage. See 3 & 4 Ed. 6, c. 3; 2 Inst. 85, 473, 476. *Nevill* v. *Hammerton*, Sid. 79: *Anon.* 4 Leon. 41: *Smith* v. *How*, 4 Rep. 38 b.: *Weekes* v. *Slades*, 2 Vern. 301: *Arthington* v. *Sawkes*, 2 Vern. 356: —— v. *Palmer*, 5 Vin. Ab. 7: *Fawcet* v. *Stricland*, Com. 578: *D'Ayrolles* v. *Howard*, 3 Burn. 1385: *Duberley* v. *Page*, 2 T. R. 391: *Glover* v. *Lane*, 3 T. R. 445: *Bateson* v. *Green*, 5 T. R. 411: *Shakespear* v. *Peppin*, 6 T. R. 741: *Grant* v. *Gunner*, 1 Taunt. 435: *Arlett* v. *Ellis*, 9 Dowl. & Ry. 897; 7 B. & Cr. 346, 9 id. 671: *Rogers* v. *Wynne*, 7 D. & Ry. 521: *Drury* v. *Moore*, 1 Stark. 102.]

Stat 29 Geo. 3, c. 36.

Inclosure for the protection of timber and underwood.

[The stat. 29 Geo. 3, c. 36, s. 1, authorises the owners of wastes, woods, and pastures, wherein any persons or bodies politic have right of common of pasture, with the consent of the majority in number and value of the commoners, and the major part of the commoners with the assent of the owners of the wastes, &c.; any other person or persons or bodies politic, with the assent and grant of the owners of the wastes, &c., and of the major part of the commoners, to inclose any part of the wastes, &c., *for the growth and preservation of timber and underwood*. By sect. 5, bodies politic, guardians, and trustees are authorised to consent; and by the amending statute, 31 Geo. 3, c. 41, tenants for life or years are authorised to consent for the duration of their own interests. And by the same act, any compensation for inclosure, which by the former act was to be paid to the overseers of the poor, is directed to be given to the commoners in proportion to their interests.]

Stat. 13 Geo. 3, c. 81.

Cultivation of arable lands in open fields.

[By the stat. 13 Geo. 3, c. 81, s. 1, in every parish where there are common field lands, the arable lands occupied in parcels, with a general right of common, may be fenced, drained, improved and cultivated by the respective occupiers, under such regulations as three-fourths in number and value of the occupiers, with the consent of the owners, shall appoint. The 8th, 9th, and 10th sections provide for a composition with cottagers and others, having rights of common or sheep-walk without land. By sects. 14 and 15, lords of manors, with the consent of three-fourths of the commoners, may demise for not more than four years any part of the commons, not exceeding a twelfth; applying the rents in draining, fencing, or otherwise improving the residue of the wastes. By other sections the commoners are authorised to make temporary regulations as to the time of turning in their cattle, &c.]

Stat. 6 & 7 Will. 4, c. 115, for facilitating the inclosure of open and arable fields in England and Wales.

Royal assent, 20th Aug. 1836.

Open and com-

[Further facilities for inclosure, without the expense of a private act, have been afforded by the stat. 6 & 7 Will. 4, c. 115, intituled, "*An Act for facilitating the Inclosure of open and Arable Fields in England and Wales.*" After reciting the General Inclosure Act of the 41st Geo. 3, c. 109, and the stat. 1 & 2 Geo. 4, c. 23 (*ante*, p. 478), it authorises two-third parts in number and value of the persons who shall be seised or possessed of, or entitled in possession to, or interested in possession in any rights of common or other rights in any open and common arable fields (including any untilled slips or balks therein), or any open and common meadow or pasture lands or fields, in any parish, township,

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Stat. 6 & 7 Will. 4, c. 115. mon lands may be inclosed with the consent of two-third parts in number and value of the parties interested therein.

or place in England or Wales, known by metes and bounds, or occupied according to known and legal rights (except as hereinafter provided), as tenant in fee-simple or in tail, general or special, or for life or lives, or by the courtesy, or for any other estate of or as of freehold, or for years determinable on any life or lives, or for any term of years whereof one hundred years shall be unexpired, or as a holder of lands or rights of copyhold, customary, tenant right, or other tenure, of an estate or interest equal in quantity to the estates hereinbefore mentioned or any of them, and for the guardian, trustee, feoffee for charitable or other uses, husband or committee of such person who at the time of any agreement for or on the making of any inclosure under this act shall be an infant, idiot, lunatic, or feme covert, or under any other disability, in such manner and with such consent as is hereinafter mentioned, to inclose such lands or any of them, and to extinguish the right of intercommonage which shall exist as well over as in respect of such land; such inclosure to be with the consent in writing of two-third parts in number and value of the persons aforesaid, the value to be ascertained by the assessments of the poor-rates of the respective parishes or townships for the then current year, which assessments, if not made according to the full annual value, shall be increased or diminished so as to represent the full annual value of the lands and rights liable to be affected by the intended inclosure, and where the lands are extra-parochial, or no poor-rates exist in respect of them, then by the full annual value thereof; no agreement for inclosure to be binding, until a public meeting of the proprietors and persons interested in the lands intended to be inclosed shall have been called for the purpose of considering the expediency thereof by notice, under the hands of three or more of such proprietors or persons interested, to be affixed on the principal outer door of the church or chapel of the parishes, townships, or places wherein the lands intended to be inclosed shall lie, or if none, of some adjoining parish, township, or place, and also advertised in some newspaper circulating in the county wherein such lands lie, at least fourteen days before the meeting. Such inclosure may after such meeting be proceeded with by the consent in writing of two-third parts in number and value of the persons interested, notwithstanding some of the parties consenting may not be present at such meeting, and may signify their consent thereto after the same shall have been holden.

The consent of the tenant in remainder necessary in certain cases.

Sect. 2. Consent of persons necessary to make up the two-thirds, and having a less estate or interest than a fee simple or in tail, or being under disability, not to be available without the written consent of the person to whom the next immediate vested estate of inheritance, in remainder or reversion, shall have been limited, being of full age and discoverte. Such consent to be sufficient, notwithstanding the person giving the same may have an equitable estate only, or may have previously charged or incumbered his reversionary estate. If such remainderman or reversioner be infant, covert, idiot, or lunatic, his or her guardian, husband, or committee may consent: Provided, that in respect to any land held in right of any benefice, no consent of the incumbent thereof shall alone be available without the concurrence of the patron, and of the archbishop or bishop to whose ordinary or peculiar jurisdic-

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tion the benefice shall be subject; and if the patron is infant, idiot, lunatic, or covert, his or her guardian, committee, or husband may consent: Provided that if the patronage of such benefice be in the Crown, and the benefice shall exceed the yearly value of twenty pounds in the King's books, no consent of the incumbent thereof shall be available, without the concurrence of the Lord High Treasurer or the First Lord Commissioner of the Treasury for the time being; but if such benefice shall not exceed the yearly value of twenty pounds in the King's books, then no consent of the incumbent thereof shall be available, without the concurrence of the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being.

Commissioners to be nominated by the parties consenting to the inclosure.

Sect. 3. After such consents, it shall be lawful for the *major part* in number and value of the persons interested, or their known agents, who may be present at a meeting to be called for that purpose, to authorise and appoint in writing under their hands one or more person or persons (not interested in the premises) to be a commissioner or commissioners for dividing, allotting, and inclosing, who are accordingly empowered to divide, &c. all or any of the open and common arable meadow or pasture lands or fields in any such parish, township, or place, or in any parishes, townships, or places adjoining or lying within two miles of the aforesaid parish, township, or place which may have been agreed to be divided, &c.; and on the death, neglect, refusal, or incapacity of any commissioner, the major part in number and value of the proprietors or their agents at a public meeting to be held in manner hereinbefore mentioned in respect to the meeting for taking such inclosure into consideration, are authorised to fill up the vacancy; and in case of default for two months, the surviving or remaining commissioner (if any) shall do so within one month; and every such new commissioner so to be appointed shall have the like powers and authorities for carrying this act into execution as the commissioners in whose place he shall have been so appointed and chosen as aforesaid was invested with under and by virtue of this and the hereinbefore recited act.

Authority of commissioners.

Sect. 4. Commissioners to appoint a clerk.

Sect. 5. Umpire to be appointed, and in case of difference of opinion between the commissioners, the matter to be determined by the umpire.

Sect. 6. Commissioners and umpire to take an oath.

Sect. 7. Commissioners to give notice of meetings, &c. Adjournment of meeting in case of failure of attendance of commissioners. Place of meeting.

Sect. 8. Mode in which other notices are to be given.

Sect. 9. Allowance to commissioners, umpire, and surveyors.

Sect. 10. Major part of proprietors may agree for payment of a gross sum to commissioners, &c.

Four-fifths of proprietors, &c. may agree to adopt any previous plan, &c.

Sect. 11. Four-fifths of proprietors, &c., may agree upon the adoption of any plan, map, admeasurement, or valuation previously made, and such agreement shall be binding upon any commissioneer or commissioners or umpire.

Sect. 12. Four-fifths in number may agree upon rules for guidance of commissioners or umpire.

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Sect. 13. Such several agreements may be appealed against to the quarter sessions. Notice of appeal. Proviso.

A copy of the objections to be left with the party objected to, or given to his agent.

Sect. 14. That if any of the parties interested shall have any objections to any of the accounts or claims which shall be delivered to the said commissioner or commissioners by virtue of the recited act or this act, such objection or objections shall be reduced into writing, and two parts thereof shall be signed by the party or parties making the same, or by some person or persons on his, her, or their behalf, and one part thereof shall be delivered to the party or parties whose claim or account shall be objected to, or to his, her, or their agent, or left at his, her, or their last and most usual place or places of abode, at such time or times as the said commissioner or commissioners shall appoint for that purpose.

For settling disputes between parties interested.

Sect. 15. If any difference shall arise between any of the parties claiming to be interested in the inclosure, concerning the respective rights or interests which they shall claim to have in, to, or out of the lands, or concerning any other matter relating to the inclosure, the commissioner or commissioners is or are authorised and required to hear and determine the same, but not to determine the title to any lands, &c. (*a*).

Sect. 16. Commissioners may award costs.

Sect. 17. Appeal by action allowed when parties are dissatisfied with decision of the commissioners.

(*a*) [When commissioners are not authorised to determine questions of title, any act of theirs purporting to have such an effect is a mere nullity, and may be disregarded without applying to set it aside. Thus, where an inclosure act authorised the commissioners to hear and determine any dispute which might arise between any parties interested in the inclosure concerning the respective shares and proportions which any of them should claim in the lands to be inclosed, but provided that nothing should enable the commissioners to determine the title to any lands, or to determine any right between any parties contrary to the possession of such parties; and by another clause gave an appeal from the acts of the commissioners to the quarter sessions within two months; it was held that an allotment of land which belonged to a charity was not conclusive, although no appeal had been made. "I am clearly of opinion," said Sir *T. Plumer*, M.R., "that the commissioners had no jurisdiction at all, and that they were expressly prohibited from interfering or meddling in any manner with this subject. It follows, as a matter of course, if they had no jurisdiction that their decision is a nullity; it does not create any necessity for an appeal where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it; if it decides upon matters with respect to which it has no authority, its decision amounts to nothing, and no party can in the least be bound by it." *Att.-Gen.* v. *Hotham*, Turn. & R. 209. See *Casamajor* v. *Strode*, 2 Myl. & K. 706, *ante*, p. 469: and *Goodmanchester* v. *Phillips*, 2 Nev. & M. 713: *Att.-Gen.* v. *Gauntlett*, 3 You. & J. 93.]

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Sect. 18. Death of parties not to abate actions.

Commissioners not to determine rights between parties except in cases of encroachments within 20 years.

Sect. 19. Commissioners not to determine any right between any parties contrary to the possession of any such parties, except in cases of encroachments made within the period of twenty years before the passing of this act; but if they shall be of opinion against the right of the person or persons so in possession, they shall forbear to make any determination thereupon until the possession shall have been given up by or taken from such person or persons by ejectment or other due course of law.

Encroachments made within 20 years to be deemed part of the land to be allotted.

Sect. 20. "That all encroachments or intakes which at any time within twenty years next preceding the date of the agreement for any such inclosure have been made upon the said lands and fields hereby authorised to be divided and enclosed shall be deemed and considered part and parcel of the lands and fields to be allotted and inclosed by virtue of this act, as if the same were actually lying open and uninclosed, and shall be divided and allotted accordingly; and in case any dispute or difference shall arise touching any such encroachments or intakes, or as to the extent thereof, such dispute or difference shall be determined by the said commissioner or commissioners."

Lands used for charitable purposes not to be deemed an encroachment.

Sect. 21. Lands taken or used before the passing of this act for the erection of a school-house or school-houses, or the appurtenances thereto, or for other charitable purposes, not to be deemed encroachments.

Lands inclosed more than 20 years deemed to be ancient inclosures.

Sect. 22. Lands enclosed for more than twenty years next preceding the date of the agreement for such enclosure to be deemed ancient inclosures.

Cultivated ground to be allotted to proprietors only.

Sect. 23. Commissioners not to allot to any other person than the proprietor thereof any land which may be cultivated as orchard or garden, or on which any building may have been erected, or which may have been inclosed by virtue of any voluntary agreement between the proprietor thereof and the persons having right of common over the same, without the consent in writing of such actual proprietor.

Sect. 24. Compensation to be made for standing crops.

Sect. 25. Commissioners to direct the course of husbandry, &c., to be followed until completion of inclosure.

Commissioners to allot the lands to be inclosed.

Sect. 26. Commissioners to allot the said lands unto and amongst the several proprietors thereof and persons interested therein, in proportion to their respective shares, rights of common, and all other rights, property, and interests, and in proportion to the true and real value of their several shares, rights of common, and all other rights, property, and interests, and the same, when so allotted, to be in lieu and full satisfaction of and for such their said several shares, rights of common, and all other rights, property, and interests, to be ascertained and adjusted in such manner as to the commissioners shall seem just and expedient, but subject to the rules, orders, and regulations herein contained or referred to and authorised to be established concerning the same.

Sect. 27. In case any number of the proprietors, &c. shall desire to have their allotments thrown together and distinguished by metes and

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bounds, but not fenced from each other, allotments may be set out together, distinguished by metes and bounds, but not fenced from each other.

For ascertaining boundaries.

Sect. 28. "That for the purposes of shortening or rendering straight or otherwise improving any boundary fence or fences between the lands and fields hereby authorised to be divided, allotted, and inclosed, and the old or other lands thereunto adjoining, or between such allotments and inclosed or other lands, or any of them, and any adjoining lands and grounds, it shall be lawful for the said commissioner or commissioners (with the consent of the lord of any manor in which the lands are respectively situate, and of the owners of any such adjoining lands, testified by writing under their respective hands, or under the common seal of any of them being a corporation aggregate), to set out, ascertain, and determine the boundaries between the lands hereby authorised to be divided, allotted, and inclosed, and any adjoining lands or grounds lying in the same or in any adjoining manor, parish, or place, as the said commissioner or commissioners shall judge proper for the purposes aforesaid; and after such boundaries shall be so set out, ascertained, and determined, as aforesaid, the same shall be made, fenced, ditched, or mounded by such person, in such manner, and at such times as the said commissioner or commissioners shall direct, and shall for ever thereafter be deemed the boundaries between the said allotted and inclosed lands respectively, or (as the case may be) between the said allotments or inclosed or other lands and such adjoining manor, parish, or place; any law, usage, or custom to the contrary notwithstanding."

Right of herbage in private roads to be set out.

Sect. 29. Commissioners to appoint the grass and herbage growing and renewing upon the private roods, to be set out within the lands inclosed, to be and remain to and for the use and benefit of such persons as they think best entitled.

Sect. 30. Empowers rectors to erect buildings on lands allotted in right of glebe, and charge expenses thereon.

Sect. 31. Rectors, with consent of bishops, may demise the allotments for twenty-one years at rack rent, payable quarterly.

Sect. 32. Where it shall happen that one or more of the proprietors shall not have an equal or proportionable quantity of boundary mounds or fences allotted to him on the inclosure, commissioners may apportion expenses of erecting boundary fences.

Act not to affect settlements, &c.

Sect. 33. Act not to revoke, make void, alter, or annul any settlement, deed, will, or lease, or prejudice any person having any right or claim of dower, jointure, annuity, rent-charge, debt, or incumbrance in, out of, upon, or affecting any of the lands, &c. allotted or exchanged or assigned in compensation for any other estate or right in pursuance of this act; but the lands allotted and the tenements or other hereditaments assigned in exchange or as a compensation for any other estate or right, to be vested, remain, and inure, to and upon the former uses, &c., except such rents and services as shall have been compensated for and extinguished, and such leases and tenancies at rack-rents as shall become void by virtue of this act, and subject to mortgages and sales made by authority of this act or of the 41 Geo. 3, c. 109.

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Leases at rack-rent may be voided.

Sect. 34. All leases, agreements, and tenancies at rack-rent subsisting of any part or parts of the lands to be inclosed at the time of the first appointment of any commissioner or commissioners, or which shall be exchanged in pursuance of this act, shall, so far only as respects the lands to be divided and allotted or exchanged, cease and be void at such time or times as the commissioners shall by writing appoint; landlords to make compensation to the tenants, to be settled between them, or by the commissioners, being required by either of the parties; rent to be apportioned.

Exchanges may be made.

Sect. 35. Commissioners may allot any lands, &c. whether situate within the boundary of such open and common lands or adjoining thereto, within the parishes, townships, or places in which the lands to be allotted and inclosed are situated, or any of them, in exchange for any other lands, &c. within the same parishes, &c. respectively, or any of them, or within any parish, &c. adjoining to the said parishes, &c. respectively, or any of them; such exchanges to be ascertained, specified, and declared in the award of the said commissioner or commissioners, and to be made with the consent in writing of the proprietor of the hereditaments which shall be exchanged, whether such proprietor be a body or bodies politic, corporate, or collegiate, corporation aggregate or sole, rector, parson, vicar, or other ecclesiastical person or persons, or a tenant or tenants in fee-simple, or for life, or in fee-tail, or by the courtesy, or for years determinable on any life or lives, by and with the consent of the lessor or lessors, but not otherwise, or with the consent of the guardians, husbands, committees, or attornies of or acting for any such proprietors as shall be respectively infants, femes covert, idiots, lunatics, or under any other legal disability, or be beyond the seas, or otherwise disabled to act for themselves, himself, or herself, or of the trustees or feoffees for charitable, parochial, or other uses, or of the person or persons having power to dispose of the hereditaments and premises which shall be so exchanged, (such consent to be testified in writing under the common seal of the body politic, corporate, or collegiate, and under the hands of the other consenting parties respectively): Provided that no exchange shall be made of any lands, &c. held in right of any church, chapel, or other ecclesiastical benefice, without the consent, testified as aforesaid, of the patron thereof, and of the bishop of the diocese in which such benefice shall be situate.

Sect. 36. Allotments to be under the same tenure as the lands in respect of which they are allotted. Commissioners may allot tithes, so that all persons may have tithe-free allotments, in lieu of lands before exempted from tithes.

For defraying expense of exchanges.

Sect. 37. Expenses of exchanges and partitions to be borne by the several persons making them in such proportions as the commissioners shall direct.

Ditches, &c. may be cleaned, altered, or widened.

Sect. 38. Commissioners may scour out, widen, and alter all such ancient ditches, drains, watercourses, tunnels, gates, and bridges in the respective lands to be inclosed, and also shall and may set out, widen, and make any new ditches, &c. (the expenses thereof to be raised and defrayed as the other expenses of executing the powers of this act are

6 & 7 Will. 4, c. 115.

directed to be raised and defrayed), and shall order by whom, and at whose expense, and at what time and in what manner, the said ditches, &c. shall be afterwards cleansed and maintained, and may direct any streams, springs, and watercourses, &c.

Sect. 39. Commissioners may make drains through land not proposed to be inclosed, due compensation being made for damage done.

Upon the consent of seven-eighths in number and value, an inclosure may take place without the intervention of commissioners.

Sect. 40. "That in case seven-eighths in number and value of the persons being seised, possessed of, entitled to, or interested in any open and common arable fields, or open and common meadow or pasture lands or fields, in England or Wales, and any rights of common or any other rights therein, being persons having such estates or interests in the said lands, fields, or rights as are hereinbefore required for the purpose of consenting to any such proposed inclosure as aforesaid, shall by themselves or their known agents, or if covert, infants, idiots, or lunatic, then by their husbands, guardians, or committees, at a public meeting to be called for that purpose in the manner and after the notice hereinbefore provided for, or at some adjournment thereof, enter into an agreement for such inclosure under the provisions of this act, but without the intervention of commissioners, and for the discharge of the lands to be inclosed from all rights of common, and for the granting of compensation to such persons as may be possessed of such rights, whether consenting parties to any such agreement or not, and shall sign or seal (as the case may require) the schedule hereinafter mentioned, every such inclosure shall, from and immediately after the expiration of the notices of such schedule having been deposited as hereinafter mentioned, be as valid and effectual to all intents and purposes (subject only to the right of appeal hereinafter given) as if the same had been effected by means of commissioners to be appointed under this act."

Schedule of land proposed to be inclosed to be deposited with the clerk of the parish and the clerk of the peace; and a notice thereof affixed on the church door, and published in some newspaper circulating in the county.

Sect. 41. Before any such inclosure, a schedule of the land, signed by the persons proposing to inclose, and by the persons whose consent is hereinbefore required, and when to be made by any person having a less estate than a fee-simple or under disability, accompanied by a copy of the several limitations contained in the deed or will under which such person may be entitled, to be deposited with the clerk of the parish, township, or chapelry, and also with the clerk of the peace of the county; and a notice of such deposit, containing a description of the land, to be published in some newspaper, usually circulating in the county, at three times in three successive months afterwards, and a copy thereof to be affixed on the outer door of the church, &c. for three successive Sundays after deposit. The affixing of the seal of a corporation aggregate to be deemed a sufficient signature.

Incapacitated persons enabled to enter into an agreement for compensation.

Sect. 42. "That it shall be lawful for any person who shall be seised or possessed of or intitled in possession to any land or tenement in respect of which compensation may be proposed or ought to be given, or to which any right of common may attach, or who, having no land in the common field in which an inclosure is proposed to be made, may nevertheless have a right of common therein, whether such person shall be tenant in fee-simple, or fee-tail, general or special, or for life or lives, or by the courtesy of England, or for any other estate of free-hold, or for years determinable on any life or lives, and also for any person whose

INCLOSURE.

6 & 7 Will. 4, c. 115.

right of common may be merely personal, and for the guardian, trustee, feoffee for charitable or other uses, husband or committee of such person who shall be an infant, idiot, lunatic, or feme covert, or under any other disability, to consent and agree to the compensation which may be offered or which ought to be given by the persons making such inclosure, not only as to the nature and amount of such compensation, but as to the manner in which the same shall be secured, and to sign the agreement for that purpose; but no such agreement shall be valid if entered into by any person having a limited interest only, or by any incumbent of a benefice, without the consent of the same persons, and to be testified in the same manner as is hereinbefore required in the case of such persons being respectively parties to any agreement for inclosure: provided always, that in case such compensation or any part thereof shall be agreed to be paid in money, and such money shall belong to any persons who in the said first-recited Act are mentioned or described as persons incapacitated to receive the same, then such money shall be paid and applied in such and the same manner as money belonging to such persons is directed to be applied under the provisions of the said first-recited Act."

Sect. 43. Persons having objections to such inclosure to deposit them with the clerk of the peace within six months from expiration of notice. Schedule and objections to be open to inspection, and to be deemed notice.

Sect. 44. Clerk of the peace to lay the schedule, &c. before the justices at quarter sessions, who shall hear and determine upon such objections.

Sect. 45. Persons interested in allotments may sell the same before the award; and commissioners may allot them to the purchasers.

Sect. 36. Commissioners, at request of tenants for life, empowered to sell allotments to defray expenses.

Sect. 47. When allotments to a tenant for life are in different parishes, commissioners may sell the land in one parish to defray expenses attending the other portion of the allotment. Proviso, limiting the amount to £5 per acre.

Sect. 48. Not to charge lands with expenses unless the sum to arise by the sale shall be less than £5 per acre.

Sect. 49. Payment of expenses of measuring, dividing, allotting, and inclosing open and common lands, to be regulated by commissioners. Proviso for exemption of small allotments.

Sect. 50. Commissioners to account.

Sect. 51. Awards to be made, enrolled, and deposited.

Sect. 52. Provisions of recited acts, where not altered or repealed, extended to this act.

Sect. 53. Appeal to quarter sessions where parties think themselves aggrieved.

Sect. 54. Act not to affect rights of lords of manors, though assenting.

Sect. 55. Act not to authorise the inclosure of any open or common fields within certain distances of large towns.

Sect. 56. Defines the meaning of certain words in the act.

INCLOSURE.

Sect. 57 saves the rights of his Majesty in respect of the Duchy of Cornwall, or of the Duke of Cornwall for the time being. 6 & 7 Will. 4, c. 115.

Sect. 58. Act not to authorise inclosure of lands in which his Majesty is interested in right of his Crown or of his Duchy of Lancaster. Saving as to the Duchy of Lancaster.

Sect. 59. General saving of rights, in respect of which no compensation shall be awarded.]

[The provisions of the above acts were extended by the stat. 3 & 4 Vict. c. 31, which, after reciting the stat. 41 Geo. 3, c. 109, and the 6 & 7 Will. 4, c. 115, enacts sect. 1, that, (subject to the right of appeal given by the secondly recited act), all awards made in pursuance of that act, or of this act, shall be conclusive evidence that the provisions of the said acts have been complied with, and all necessary consents given; and no other evidence than such awards shall be requisite to establish the title under the inclosure. Provided, that if any party concerned or interested in any such inclosure, shall, after the making of the award, take possession of, or proceed to inclose, or to cultivate any allotment, or any land given in exchange, and awarded to him, all right of appeal by such party against the award shall from that time, be deemed to have been waived. 3 & 4 Vict. c. 31. The award to be conclusive evidence that the provisions of the act have been complied with, and the necessary consents given. Parties taking possession of, or proceeding to inclose or cultivate their allotments, to be deemed to have waived right of appeal.

Sect. 2. That so much of the powers and provisions in the first-recited act contained, as relate to the ascertaining, setting out, determining, and fixing the boundaries, of any parishes, manors, hamlets, or districts, shall extend and be applicable to the straightening of the boundaries of any parish, manor, hamlet, or district, to be divided and inclosed under either of the said acts, whenever the lands of such parish, manor, hamlet, or district shall be, or be reputed to be, intermixed with the lands of any other parish, &c. Powers of commissioners in setting out and straightening boundaries extended.

Sect. 3. When the commissioners shall, for the purpose of ascertaining or straightening boundaries, sever any land from any parish, &c. to which it may have been reputed to belong, they shall, by their award, declare to what parish, &c., such land shall be annexed; and the same shall thenceforth for all purposes belong to such parish, &c. (*a*). Commissioners to annex the land cut off to either parish.

Sect. 4. Reciting, that doubts have arisen whether the stat. 6 & 7 Will. 4, c. 115, applies to and includes such open and common arable fields, as have adjacent thereto (but not separated by any fence therefrom) certain tracts of grass land, commonable during part of the year, and holden in severalty, or by lot or apportionment, by or among persons interested therein, during other parts of the year, enacts, That the said act, and all powers and provisoes therein contained or mentioned, shall be held to apply and extend to all such last-mentioned open and common fields, and tracts of grass land. Powers of stat. 6 & 7 Will. 4, c. 115, extended to lands commonable only during part of the year.

Sect. 5. Act to be construed as one with the stat. 6 & 7 Will. 4, c. 115.] Act to be construed with 6 & 7 Will. 4.

(*a*) [These words seem not to come within the construction put upon the words of a local act in the case of *Rex* v. *Pill*, 2 Nev. & M. 363, *infra*, Vol. 4, p. 669, but to include mines under the lands of which the parochial locality is changed.]

11. SALE OF MANOR, &c. IN FEE, BY TRUSTEES AND CESTUIS QUE TRUST, TO TWO PURCHASERS.

11. AGREEMENT *for the sale of a* MANOR, ADVOWSON, TITHES, MESSUAGES, *&c.* IN FEE, *by three* TRUSTEES *under a will, one of whom is one of the* Cestuis que Trust, *and in which the other* Cestuis que Trust *join, to two Persons; the* TIMBER *to be taken at a* VALUATION, *if not exceeding a certain Sum;* STOCK *transferred to a third Person by way of* DEPOSIT; *and Agreement by the purchasers to allow the Tenants a Compensation for Crops, &c.*

ARTICLES OF AGREEMENT made, concluded, and agreed upon, this —— day of ——, in the year 18—; BETWEEN [*three trustees*] of &c., which said [*trustees*] are devisees and trustees, named in the last will and testament of [*testator*], late of &c., deceased; the said [*one of the trustees, who is also one of the cestuis que trust*] in his own right, [*husband of one of the cestuis que trust*], of &c., and [*wife*] his wife, and [*the other cestuis que trust*], of &c., of the one part; and [*purchasers*], both of &c., of the other part.

Parties.

Recital of contract for sale.

WHEREAS the said [*trustees*], as devisees and trustees as aforesaid, and the [*trustee and cestui que trust*], in his own right [*husband of cestui que trust*] on behalf of himself and the said [*wife*] his wife, and the said [*other cestui que trust*], have contracted with the said [*purchasers*] for the absolute sale to them of the manor or lordship of ——, in the said county of ——, with the rights, members, and appurtenances, thereunto belonging or appertaining; and of the advowson of the vicarage of —— aforesaid; and of the several messuages, farms, lands, tenements, tithes, and hereditaments hereinafter mentioned, with their appurtenances, and the inheritance thereof in fee-simple in possession, free from incumbrances, (except as hereinafter mentioned), at or for the price or sum of £——, exclusive of the timber thereon, which is to be taken at a valuation, as hereinafter mentioned: NOW THESE PRESENTS WITNESS, that for and in consideration of the sum of £—— of lawful British money; *and also,* of such further sum of like lawful money,

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11. SALE OF MANOR, &c. IN FEE, BY TRUSTEES AND CESTUIS QUE TRUST, TO TWO PURCHASERS.

not exceeding the sum of £——, as the timber standing and growing upon the said hereditaments shall be valued or estimated at, in manner hereinafter mentioned, to be paid to the said [*trustees*], [*husband*], and [*wife*] his wife, and [*other cestui que trust*], or such person or persons as they shall respectively direct or appoint, under or in pursuance of the agreement hereinafter for that purpose contained, on the part and behalf of the said [*purchasers*]; they the said [*trustees*], in their capacities of devisees and trustees as aforesaid; and also the said [*trustee and cestui que trust*], in his own right, and the said [*husband*], on the behalf of himself and the said [*wife*] his wife, and the said [*other cestui que trust*], in her own right, do hereby respectively covenant and agree with the said [*purchasers*], their heirs and assigns, and with each of them, that the said [*trustees*], [*trustee and cestui que trust*], [*husband*], and [*wife*], his wife, and [*other cestui que trust*], their heirs, executors, or administrators, will and shall, on or before the —— day of —— now next ensuing the date hereof, to the satisfaction and good liking, and with the approbation of the said [*purchasers*], their heirs or assigns, or their counsel, make out and establish a good and clear title to the freehold and inheritance in fee-simple, of and in, and by good and sufficient conveyances and assurances in the law, to be executed by all necessary and proper parties, well and sufficiently convey and assure, ALL THAT the manor or lordship of ——, with its rights, members, and appurtenances, situate and being in the county of ——; *And also*, ALL THAT the advowson, right of patronage and presentation, of and to the vicarage of —— aforesaid; *And also*, ALL and singular the messuages, farms, lands, tenements, and hereditaments, mentioned and described in the particular or schedule hereunder written; *And also*, all other the messuages, farms, lands, tenements, tithes, and hereditaments whatsoever, of them the said [*trustees*] and [*cestuis que trust*], or any of them, or of or to which they or any of them are or is seised or entitled, at law or in equity, under or by virtue of the will of the said [*testator*], and situate, lying, and being at —— aforesaid, with their and every of their appurtenances; and the inheritance thereof, in fee-simple, unto and to the use of the said [*purchasers*], their heirs and assigns, or otherwise as they shall direct or appoint, freed and discharged of and from all charges and incumbrances whatsoever, *Except* such as are mentioned

Vendors to make out title to, and convey,

Parcels;

Manor;

Advowson;

Messuages.

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in the schedule or particular hereunder written: AND IT IS HEREBY AGREED AND DECLARED, between and by the said several parties hereto, that all the timber and timber-like trees, standing, growing, and being upon the said manors, farms, lands, hereditaments, and premises, so contracted to be purchased as aforesaid, shall be valued and appraised by two indifferent persons; one of them to be nominated and appointed by and on behalf of the said [*trustees*] and [*cestuis que trust*]; and the other of such two indifferent persons to be nominated and appointed by and on the behalf of the said [*purchasers*]: AND in case such two persons so to be nominated and appointed as aforesaid should not agree in the estimate or value of such timber and timber-like trees, then the same shall be valued and appraised by such one indifferent person as the first two nominees shall for that purpose appoint umpire in the premises. AND the estimate or valuation of such two persons, or of their umpire, to be respectively nominated and appointed as aforesaid, shall be final and conclusive upon the said parties hereto; AND in consideration of the agreement hereinbefore contained on the respective parts of the said [*trustees*] and [*cestuis que trust*], they the said [*purchasers*] *do*, and each of them *doth*, hereby covenant, promise, and agree, to and with the said [*trustees*] and [*cestuis que trust*] respectively, and their respective heirs and assigns, that they the said [*purchasers*], their heirs, executors, or administrators, or some or one of them, will or shall, on or before the —— day of —— now next ensuing, upon the title to the said manor, advowson, messuages, farms, lands, tenements, tithes, and hereditaments, being approved of by the counsel of the said [*purchasers*], their heirs, or assigns, and upon the execution of such conveyances and assurances as are hereinbefore agreed to be made and executed of the same premises, pay, or cause to be paid, unto the said [*trustees*] and [*cestuis que trust*], or such other person or persons as upon the investigation of the title shall appear to be entitled to receive the same, the full sum of £——, of like lawful money as aforesaid: *and also*, such further sum or sums of money, not exceeding the sum of £ ——, as the value of the timber and timber-like trees shall according to such appraisement thereof as aforesaid, amount unto: *And also*, that they the said [*purchasers*], their heirs, executors, or administrators, will or shall bear, pay, and sustain the whole of the costs, charges, and ex-

Timber to be valued by arbitrators.

And if they disagree, by umpire.

Covenant by vendees to pay the purchase-money;

the valuation of timber not exceeding a certain sum;

and the expenses attending the valuation.

11. SALE OF MANOR, &c. IN FEE BY TRUSTEES AND CESTUIS QUE TRUST, TO TWO PURCHASERS.

penses, to be occasioned by, or otherwise attending, the valuation and appraisement so to be made of the said timber and timber-like trees as aforesaid: PROVIDED ALWAYS, AND IT IS HEREBY AGREED AND DECLARED, that in case the value of the timber and timber-like trees shall, according to such appraisement thereof, exceed the sum of £——, then the said [*purchasers*] shall have the benefit of such excess, and the sum of £—— shall be considered as the full price of the whole of such timber and timber-like trees: BUT NEVERTHELESS IT IS AGREED, that in case the value of the said timber and timber-like trees should, according to such appraisement, be less than the sum of £——, then only so much money shall be paid by the said [*purchasers*], their heirs, executors, or administrators, for the price or consideration for such timber and timber-like trees, as the same shall be so actually valued and appraised at, as aforesaid: AND IT IS HEREBY AGREED AND DECLARED, between and by the said parties hereto, that the costs and expenses of preparing and executing the deeds of conveyance of the said premises, shall be borne and paid by the said [*purchasers*], their executors, or administrators: BUT the costs and charges of making out the title to the said premises, and of all and every conveyance or conveyances, assurance or assurances, which shall be necessary for making good or clearing up the title, shall be borne and paid by the said [*trustees*] and [*cestuis que trust*], or some or one of them: AND IT IS HEREBY ALSO AGREED between the said parties hereto, that they the said [*purchasers*], their heirs or assigns, shall have and be entitled to the possession of the said manor, &c., with their appurtenances, upon the —— day of ——, 18—; and to receive the rents, issues, and profits thereof, from that time; and that all outgoings, for or in respect of the premises, shall be duly paid and discharged by the said [*trustees*] and [*cestuis que trust*] up to the said —— day of —— 18—: AND they the said [*trustees*] and [*cestuis que trust*] do hereby severally undertake and agree with the said [*purchasers*], that good and sufficient notices have been duly served upon the said several tenants of the said manor, &c., so agreed to be purchased as aforesaid, to quit the possession and occupancy thereof at Lady-day, which will be in the year 18—; and that in consequence of such notices, such respective tenants will be compellable, on that day, to quit and deliver up the premises by them

Purchasers not to pay more for the timber than a stipulated sum.

Expenses of conveyances &c. to be paid by purchaser;

of making out the title, by vendors.

Purchasers to have possession on a given day.

Undertaking by vendors, that proper notices have been served on the tenants to quit.

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respectively holden: AND WHEREAS part of the lands so agreed to be purchased as aforesaid hath been sown with wheat, other part thereof with clover and other grass seeds, and fallowing and other acts of cultivation have been done on other parts thereof, by the respective tenants thereof, which they cannot take or receive the benefit of, in consequence of such notices so given them to quit as aforesaid, NOW THE SAID [*purchasers*] do hereby respectively agree with the several other persons parties hereto, that in case the said [*purchasers*] do hereby respectively agree with the several other persons parties hereto, that in case the said [*purchasers*] shall require the tenants of the said several farms, lands, hereditaments, and premises, or any of them, to quit or deliver up the possession of the premises by them respectively holden or occupied, pursuant to the said notices to them respectively given for that purpose as aforesaid, then, and in that case, they the said [*purchasers*], their heirs, executors, or administrators, will or shall pay unto each of the tenants or occupiers of the same farms, lands, hereditaments, and premises, who shall be so required to quit or surrender up the premises by them respectively holden or occupied, such sum or sums of money as shall be considered a fair and reasonable satisfaction to him or her for the sowing, making, fallowing, and doing other acts of cultivation as aforesaid; the amount of such sum or sums of money to be ascertained by two indifferent persons, the one of them to be named and appointed by the tenant of such lands and premises, and the other by the said [*purchasers*], their heirs or assigns; and in case such two persons cannot agree to determine the amount of such sum or sums of money, then the amount thereof shall be ascertained by such one person as the two first nominees shall appoint umpire for that purpose, whose determination shall be final: AND WHEREAS the said [*purchasers*] have, previously to the execution of these presents, with the consent and approbation of the said [*trustees*] and [*cestuis que trusts*] transferred——Consolidated three pounds per centum Annuities, into the name of [*trustee*], of &c., as by reference to the books of the governor and company of the Bank of England will appear: Now it is hereby agreed and declared between and by the said parties hereto, that the said —— Consolidated three pounds per centum Annuities are and were so transferred into the name of the said [*trustee*], at the request and with the consent of the said [*trustees*]

Recital that part of the lands has been sown with seeds, &c.

Agreement by vendors to pay for same according to valuation.

Recital of transfer of stock.

Declaration that same was in trust as a deposit in part of purchase-money.

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and [*cestius que trust*], as a deposit, and to the intent that the same may be applied in part payment of the aforesaid purchase-money or sum of £ ——; and for that purpose it is hereby further agreed and declared, that upon the title to the said manor, messuages, &c., being approved by the counsel of the said [*purchasers*], their heirs or assigns, and upon the execution of the conveyance or assurance hereinbefore agreed to be made and executed of the same premises, he the said [*trustee*] shall sell and dispose of the said —— Consolidated three pounds per centum Annuities, and shall pay the money arising by such sale, (after deducting the usual commission for brokerage), unto the said [*trustees*] and [*cestuis que trust*] or such of them, or such other person or persons, as shall appear to be entitled to receive the aforesaid purchase-money, in or towards payment and satisfaction of so much of the aforesaid purchase-money or sum of £——; PROVIDED ALWAYS, that in the mean time, and until the sale of the said —— Consolidated three pounds per centum Annuities as aforesaid, the dividends and interest thereof shall be paid to and received by the said [*purchasers*]: PROVIDED ALSO, that in case the said contract so entered into for the sale of the said manor, &c., and premises aforesaid, should be relinquished or abandoned by the said several parties hereto; or in case the same cannot be carried into execution by reason of any defect of title, or otherwise, then the said [*trustee*] shall stand possessed of and interested in the said —— Consolidated three pounds per centum Annuities, *In trust* for the said [*purchasers*], their executors, administrators, and assigns. IN WITNESS, &c.

But purchasers to be entitled to intermediate interest on deposit.

If contract cannot be carried into effect, deposit to be held in trust for purchasers.

THE FIRST SCHEDULE TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

THE SECOND SCHEDULE TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

12. FOR SALE OF AN INFANT'S ESTATE IN FEE.

12. AGREEMENT *for the Sale of an* INFANT'S ESTATE *in fee; and* COVENANT *that the Infant, or his Heirs, when competent, shall convey; and that a* MORTGAGEE *for years shall assign his Security to the Purchaser; and that in case of the Infant's Default, a Sum shall be paid by way of* LIQUIDATED DAMAGES (*a*).

Parties.

ARTICLES OF AGREEMENT made and entered into the —— day of ——, 18—, BETWEEN [*vendor*], of &c., and [*other vendor*], of &c., widow and relict of [*ancestor*], late of &c., deceased, of the one part; and [*purchaser*], of &c., of the other part.

Recital of ancestor's intestacy, and infancy of his heir;

WHEREAS the said [*ancestor*], deceased, departed this life in or about the month of ——, 18—, intestate, leaving [*infant*], an infant now of the age of —— years or thereabouts, his eldest son, and one daughter, and two younger sons.

ancestor's seisin in fee subject to mortgage for years;

AND WHEREAS the said [*ancestor*], deceased, was at the time of his death seised in fee-simple of the messuage, lands, and hereditaments hereinafter more particularly described, subject to a mortgage thereof made for a term of two thousand years to [*mortgagee*], for securing to her £——, and interest; which mortgage has since been assigned to the said [*assignee of mortgagee*], for securing to him the like sum of £—— and interest.

descent to infant heir subject to mortgage;

AND WHEREAS, upon the death of the said [*ancestor*], the father, the said messuage, lands, and hereditaments descended to and become vested in the said [*infant*], the infant, as the heir at law of the said [*ancestor*], deceased, subject to the said term of two thousand years, and the principal and interest monies thereby secured.

and that sale would be beneficial to infant.

AND WHEREAS the said [*vendors*] being of opinion that it would be beneficial to the said [*infant*], the infant, if the said mes-

(*a*) In cases of this kind it is often advisable to have a private act of Parliament, which fully effectuates the intention of the parties immediately, without any conveyance from the heir; but a full equivalent must be settled on the infant, and it must clearly appear that he will be benefited by the act. 2 Bla. Com. 345; 5 Cru. Dig. 8, 2d Ed.

12. FOR SALE OF AN INFANT'S ESTATE IN FEE.

Testatum.

suage, lands, and hereditaments, were absolutely sold, they have entered into such agreement for the sale thereof to the said [*purchaser*], as is hereinafter mentioned: NOW THESE PRESENTS WITNESS, that the said [*vendors*] in consideration of the sum of £——, to be paid by the said [*purchaser*] in the manner hereinafter mentioned, do, and each of them doth, hereby jointly and severally, and for their and each of their heirs, executors, and administrators, covenant and agree with the said [*purchaser*], his heirs, executors, administrators, and assigns, in manner following, that is to say: That the said [*infant*], the infant, within six calendar months next after he shall attain the age of twenty-one years, or in case of his death in the mean time, the heir or heirs at law of the said [*infant*], the infant within six calendar months next after he, she, or they, shall be capable by law of making and executing a conveyance of freehold hereditaments, and all other necessary and proper parties, shall, at the costs and charges of the said [*infant*], the infant, or his heirs, make out a good title unto, and at the expense of the said [*purchaser*], his heirs, executors, administrators, or assigns, well and effectually convey and assure, unto and to the use of the said [*purchaser*], his heirs and assigns, or otherwise, as he or they shall direct: ALL THAT messuage, dwelling-house, or tenement called ——, with the out buildings, &c., together with all the rights, members, and appurtenances to the premises aforesaid belonging, free from all incumbrances whatsoever, (except as appears in and by these presents, in respect to the said term of two thousand years, and the principal and interest monies thereby secured); *And further*, that he the said [*assignee of mortgagee*], his executors or administrators, and every other person claiming or to claim through or under him, will and shall, upon the —— day of the present month of ——, at the expense of the said [*widow of ancestor*], (the administratrix of the said [*ancestor*], deceased), make and execute unto the said [*purchaser*], his executors, administrators, or assigns, an assignment of the said messuage, lands, and premises, for the residue which will be then unexpired of the said term of two thousand years, subject to such equity of redemption as shall then affect the premises; *And* will and shall by the same deed, assign and assure to the said [*purchaser*], his executors, administrators, or assigns, the said mortgage debt or sum of £——, and all interest thenceforth to grow due

Covenant by vendors,

that infant or his heirs shall make a title at his or their own costs;

and convey at purchaser's costs.

Parcels.

That assignee of mortgagee shall assign term and mortgage-money to purchaser at the vendor's expense;

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for the same: *And also* that he, the said [*purchaser*], his heirs and assigns, shall and may at all times henceforth, until the said messuage, lands, and hereditaments shall be conveyed to him or them as aforesaid, or until such refusal or neglect of or by the said [*infant*], the infant, or his heirs, to make and execute a conveyance of the said messuage, lands, and hereditaments, as hereinbefore mentioned, peaceably and quietly have, hold, and enjoy the same messuage, lands, and hereditaments, and every part thereof, with their appurtenances, and receive and take the rents and profits thereof to his and their own use, without any let, suit, trouble, or interruption of, from, or by the said [*infant*], the infant, his heirs or assigns, or any other person or persons claiming or to claim by, from, or under, or in trust for him or them, or under or in trust for the said [*ancestor*], deceased.

that purchaser may quietly enjoy.

Covenant by purchaser to pay mortgage-money on execution of assignment;

AND THE SAID [*purchaser*], in consideration of the covenants and agreements in these presents contained, on the part of the said [*vendors*], doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendors*], jointly, and each of them separately, and the heirs, executors, and administrators, of them and each of them, in manner following, that is to say; that he the said [*purchaser,*] his heirs, executors, or administrators will or shall, upon the said —— day of this present month of ——, and upon the execution by the said [*assignee of mortgagee*], of such assignment as aforesaid of his said security, well and truly pay, or cause to be paid, unto the said [*assignee of mortgagee*], his executors, administrators, or assigns, the sum of £—— of lawful British money, in full for the principal money secured to him as aforesaid, on mortgage of the said messuage, lands, and hereditaments: *And* will or shall upon the said —— day of the same month of ——, well and truly pay, or cause to be paid, unto the said [*vendors*], or one of them, for the use and benefit of the said [*infant*], the infant, the further sum of £—— of lawful money of Great Britain; *And also* will or shall, upon the perfecting, completing, and executing of such good title to, and conveyance of, the said messuage, lands, and hereditaments, unto the said [*purchaser*], his heirs or assigns, as aforesaid, well and truly pay, or cause to be paid, unto the said [*infant*], the infant, his heirs or assigns, the further sum of £—— of like lawful money; which sums of £——, £——, and £——, making together £——, are to be considered to be in full for the absolute

to pay further sum to vendors at same time;

and to pay remainder of purchase-money on execution of conveyance by infant or his heirs.

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purchase of the said messuage, lands, and hereditaments, discharged of the aforesaid mortgage. AND FURTHER, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall well and truly pay, or caused to be paid, unto the said [*vendors*], or one of them, the executors, administrators, or assigns of them or one of them, for the use and benefit of the said [*infant*], the infant, or his heirs, interest for the said sum of £——, after the rate of £5 per centum per annum, to be computed from the said —— day of this present month of ——, until payment of the said principal sum, half yearly, as such interest shall become due; the first half-yearly payment of such interest to be made on the —— day of —— next ensuing; *and* that he the said [*purchaser*], his executors, administrators, or assigns, will not nor shall call in or compel payment of the said principal sum of £——, so to be advanced and paid by him to the said [*assignee of mortgagee*] as aforesaid, or any part thereof, or any interest for the same, or the said sum of £——, until default shall be made in the performance of all or any of the covenants or agreements of the said [*vendors*], hereinbefore contained: PROVIDED ALWAYS, *and it is hereby declared* to be the true intent and meaning of all and singular the said parties to these presents, that if the said [*infant*], the infant, for the space of six calendar months next after he shall attain the age of twenty-one years, or in case of his death in the mean time, if the heir or heirs at law of the said [*infant*], the infant, for the space of six calendar months next after he, she, or they shall be capable, by law, of making and executing a conveyance of freehold lands, shall refuse or neglect to make out a good title, and execute a proper conveyance of the said messuage, lands, and hereditaments, and the inheritance thereof in fee-simple, unto the said [*purchaser*], his heirs or assigns, such conveyance being prepared and tendered for execution by and at the expense of the said [*purchaser*], his heirs or assigns; then the said [*purchaser*], his executors, administrators, or assigns, shall, at any time thereafter, be entitled to demand, sue for, recover, and receive of and from the said [*infant*], the infant, his heirs or assigns, or the personal representative for the time being of the said [*ancestor*], deceased, the said sum of £——, so to be paid by the said [*purchuser*] to the said [*assignee of mortgagee*], as aforesaid, with the interest thereof, to be computed from the said —— day of this present month of ——

Purchaser to pay interest on part remaining unpaid.

Not to compel payment of mortgage-money.

If title be not perfected, and conveyances made, purchaser may compel payment of mortgage-money.

12. FOR SALE OF AN INFANT'S ESTATE IN FEE.

to the day on which the said principal money shall be actually paid, any thing hereinbefore contained to the contrary thereof notwithstanding. AND THE SAID [*vendors*], for themselves jointly and severally, and for their joint and several heirs, executors, and administrators, do, and each of them doth hereby further covenant and agree with the said [*purchaser*], his heirs, executors, administrators, and assigns, that in case of such refusal or neglect on the part of the said [*infant*], the infant, or his heir or heirs at law as aforesaid, they, the said [*vendors*], or one of them, or the heirs, executors, or administrators of them or one of them, will or shall, immediately on such refusal or neglect, well and truly repay, or cause to be repaid, unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of £—— so to be advanced and paid by the said [*purchaser*], together with interest for the same after the rate of five pounds per centum per annum, to be computed from the said —— day of —— to the day on which the repayment of the said sum of £—— shall be actually made; *And also* will or shall at the same time well and truly pay, or cause to be paid unto the said [*purchaser*], his executors, administrators, or assigns, the further sum of £——, by way of liquidated damages for the non-performance of the covenant and engagement hereinbefore entered into by the said [*vendors*], for and on the part of the said [*infant*], the infant, or his heir or heirs at law, and not by way of penalty. IN WITNESS, &c.

And vendors in that event covenant to repay sum advanced to them;

with interest;

and further sum by way of liquidated damages.

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13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

13. [J. AGREEMENT *under Seal for the* SALE *and* PURCHASE *of* FREEHOLD LANDS, *containing* SPECIAL STIPULATIONS *as to* TITLE (*a*).

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—; BETWEEN [*vendor*],

(*a*) [J. It has been thought advisable to substitute this precedent for a contract for sale of an entailed rent-charge, which was given by Mr. Bythewood in the first edition, and was too special in its circumstances for general use. For this and the next precedent, and the notes accompanying them, the present editor is exclusively responsible. J.]

of &c., of the one part; and [*vendee*], of &c., of the other part.

13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

Recital of contract.

WHEREAS the said [*vendor*] hath lately contracted with the said [*vendee*] for the absolute sale to him of the hereditaments hereinafter mentioned, including the timber thereon, free from all incumbrances (except as hereinafter also mentioned), at or for the price or sum of £——. NOW THEREFORE THESE PRESENTS WITNESS, that in consideration of the sum of £—— of lawful money of the United Kingdom, to be paid to the said [*vendor*] at the time and in manner hereinafter expressed, he the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, covenant with the said [*vendee*], his heirs and assigns, that he the said [*vendor*], or his heirs, together with all other necessary parties, will, at or upon the —— day of —— next, by such conveyances and assurances in the law as the said [*vendee*], his heirs or assigns, or his or their counsel shall require, well and effectually convey, or otherwise assure unto the said [*vendee*], his heirs or assigns, or to such person or persons as he or they shall direct; ALL THAT, &c., (*describe parcels, referring to Schedules*), certain parts of which hereditaments and premises are now in the tenure or occupation of ——, by virtue of an indenture of lease, bearing date the —— day of ——, granted to him by the said [*vendor*] for the term of —— years, from the —— day of —— then last, at the yearly rent of £——, payable quarterly; other parts thereof are in the occupation of ——, as tenant from year to year, at the yearly rent of £——, and the residue thereof is in the hands of the said [*vendor*]; *And* the said [*vendee*], in consideration of the covenant hereinbefore contained on the part of the said [*vendor*], doth hereby, for himself, his heirs, executors, and administrators, covenant with the said [*vendor*], his heirs, executors, and administrators, that he the said [*vendee*], his heirs, executors, or administrators, will, on the said —— day of —— next, on having a good and effectual conveyance executed to him or them as aforesaid, pay, or cause to be paid unto the said [*vendor*], his executors, administrators, or assigns, the sum of £——, being the full consideration money agreed to be given by the said [*vendee*] for the purchase of the said hereditaments. AND IT IS HEREBY AGREED AND DECLARED, that the said [*vendee*] shall be put

Testatum.

In consideration of purchase-money.

Vendor covenants to convey to purchaser in fee.

Parcels.

Covenant by vendee to pay purchase-money.

Stipulations as to possession.

13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

in possession of all such parts of the said hereditaments as are in hand, and shall be entitled to receive the rents, issues, and profits of such parts of the said hereditaments as are in the possession of the tenants thereof, upon and from the said —— day of —— next; and that all rates, taxes, and other outgoings, in respect of the hereditaments hereby covenanted to be sold, up to that time, shall be discharged by the said [*vendor*]. AND IT IS HEREBY FURTHER AGREED AND DECLARED, that if the completion of the said purchase shall be delayed beyond the —— day of —— next, then and in such case the said [*vendee*] shall pay and allow interest after the rate of £5 per cent. per annum unto the said [*vendor*] for the said purchase-money of £——, or so much thereof as shall then remain unpaid, such interest to be computed from the said —— day of ——, up to and until the day on which the said purchase shall be completed; PROVIDED ALWAYS, and it is hereby further agreed and declared, that in case the said [*vendee*] shall, at any time or times previously to the said —— day of —— next, pay to the said [*vendor*] any sum or sums of money on account of the said purchase or consideration money of £——, then and in such case the said [*vendee*] shall, on the completion of the said purchase, be allowed and receive a discount or rebate of interest after the rate aforesaid, on the sum or sums, so paid by him on account of such purchase-money, such discount to be calculated from the time or respective times when the same sum or sums shall be paid, up to and until the day on which the said purchase shall be completed; *Nevertheless*, it is hereby declared and agreed, that the payment by the said [*vendee*], his heirs or assigns, of any such sum or sums on account of the said purchase or consideration money of £——, shall not be deemed or construed to be an acceptance by him or them of the title to the said premises, or as a waiver of any objections which may arise or be made thereto; *And further*, that the said [*vendor*] shall or will, at his own costs and charges, deliver unto the said [*vendee*], his attorney or solicitor, a true and complete abstract of his title to the said closes of ground and premises, on or before the —— day of —— now next; *And* that the assignment of outstanding terms of years (if any) in the said hereditaments, which have not been already assigned in trust to attend the inheritance of the said hereditaments, except as hereinafter mentioned, shall be prepared and exe-

Interest on purchase-money.

Allowance of discount on purchase-money paid before the time.

Such payment not to be a waiver of objections to title.

Vendor to make out title.

Assurance required to complete the vendor's title, to be at his expense.

cuted at the costs and charges of the said [*vendor*], his heirs or assigns; *And* on the other hand it is agreed that the conveyance and assurance of the said hereditaments and premises, and the assignments of such terms in the said hereditaments as have been already assigned to attend the inheritance, as also all attested copies of deeds and covenants for the production of the same; and also, all copies of wills and acts of Parliament which may be required, shall be prepared at the sole costs and charges of the said [*vendee*], his heirs or assigns (*a*); AND IT IS HEREBY FURTHER AGREED AND DECLARED, that all title deeds and documents relating solely to the hereditaments and premises hereby agreed to be sold, shall be delivered to the said [*vendee*] on the completion of the said purchase; *And* that the said [*vendor*]

13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

Copies of deeds, &c. to be at purchaser's expense.

What title-deeds to be delivered to purchaser.

What to be re-

(*a*) Add, if so intended,

"*And* the said [*vendee*] his heirs or assigns, shall be at the expense of any administration or administrations that may be required to be taken out for the purpose of constituting a personal representative or representatives of the trustee or trustees, in whom any term or terms of years affecting the said premises, or any part thereof, shall have been vested."

Vendee to be at the expense of administrations.

[J. The present practice of requiring on behalf of a purchaser the assignment of outstanding terms, and the expense which has been frequently found to attend a compliance with the requisition, where the trustee of the term has been long dead, and nothing is known of his representatives, have led to the frequent introduction into contracts for sale of a stipulation, throwing the expense of any limited administration that may be required upon the purchaser, who is often disposed, if the purchase is small and the term is not likely to be wanted for his protection against incumbrances, to dispense with an assignment of the term rather than incur the expense of getting in the term. Clauses of this nature should not be confined to *limited* administrations, since they may give rise to disputes as to whether the vendor has used due diligence in discovering the next of kin, and inducing them to obtain a general administration, for it is in these events only that a limited administration would become necessary. The difficulty attending the deduction of titles to terms, &c., sometimes induces an unfavourable feeling towards the refinements in modern conveyancing, out of which requisitions of this kind have sprung; but it should be remembered, that the inconvenience is rather the result of the negligence of former times, than of the more cautious system of the present day; for if the practice of modern conveyancing had prevailed during the last century, the investigation of titles would lead to few of the difficulties which are now to be encountered. J.]

Remarks upon stipulations of this nature.

13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

tained by the vendor.

shall retain such of the deeds and documents as relate to the title of the hereditaments hereby agreed to be sold, jointly with other hereditaments, the property of the said [*vendor*], of greater, equal, or inferior value, he the said [*vendor*], his heirs or assigns, covenanting with the said [*vendee*], his heirs and assigns, for the production and preservation of the said last-mentioned deeds and documents; *And* that in case the said [*vendor*] or his ancestors shall have entered into any covenant for the production of any of the deeds which, on the completion of this purchase, shall be delivered up to the said [*vendee*], he the said [*vendee*] shall, at his expense, enter into similar covenants with the persons entitled to the benefits of such former covenants, if such persons shall be willing to accept of the said [*vendee's*] covenant, in lieu of the covenants of the said [*vendor*] or his ancestors, but if not, the said, [*vendee*] shall, at his own expense, execute unto the said [*vendor*] a covenant of indemnity in respect thereof.

Recital of grant of way.

AND WHEREAS, by certain articles of agreement, bearing date the —— day of ——, 18—, and made between [*vendor's ancestor*] of the one part, and A. B. of the other part, the said [*vendor's ancestor*], who is therein recited to have been seised of some freehold estate, in a certain field called ——, (being parcels of the said several hereditaments hereby contracted to be sold), did covenant and agree with the said A. B. for the peaceable and quiet enjoyment by him the said A. B., his heirs and assigns, of a certain lane or way containing about ——, which had been lately inclosed by the said [*vendor's ancestor*], and then formed a part of the said close called ——, at, under, and subject to the payment for ever thereafter unto him the said [*vendor's ancestor*], his heirs or assigns, or unto such other person or persons as should, for the time being, be seised or possessed of the said close, of the annual sum of £——.

Purchaser to accept an annual sum in lieu of a certain lane or way.

NOW IT IS HEREBY AGREED AND DECLARED, BY AND BETWEEN THE PARTIES HERETO, that the said lane or way so inclosed, and forming part of the said close, shall be excepted out of this contract, and the conveyance to be made in pursuance hereof; and that the said [*vendee*], his heirs and assigns, shall accept and take the said annual sum of £——, in lieu and full compensation of and for the same lane and way so inclosed as aforesaid. AND WHEREAS a small parcel of land, lying at the north-eastern end of a garden belonging to a cottage, now or

formerly called ——, parcel of the premises hereby contracted to be sold, was purchased by the said [*vendor*] from A. Z., of &c., who conveyed the same to him in fee, by indentures of lease and release, bearing date the —— and —— days of ——, but no deeds or documents of title were, upon that occasion, delivered to the said [*vendor*]; It is THEREFORE further agreed between the said [*vendor*] and [*vendee*], that he the said [*vendor*] shall not be called upon for, or be required to produce any other evidence or documents of title to the last mentioned parcel of garden-ground, or to any allotment or allotments made in respect thereof, and hereby contracted to be sold, other than the said indentures of lease and release (*a*). And WHEREAS the

13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

Purchaser not to require title to be deduced to a small piece of ground anterior to the vendor's conveyance.

(*a*) [J. No precaution should be more strongly impressed upon persons about to dispose of real estate, than that of having the title submitted to investigation previously to their entering into a contract for sale. Not only does this precaution sometimes prevent the dangerous exposure to third persons of a fatal and irremediable defect, (and which might have led to actual eviction), but it enables the vendor to enter into special stipulations, adapted to the particular circumstances of the title. Where the contract is entered into, without such a previous examination as is here recommended, it is very convenient to introduce some general stipulations of the nature of those in the text, negativing the purchaser's right to require evidence of heirship, deaths, and other facts recited in deeds of a certain antiquity, which is often a subject of much dispute between vendors and purchasers. If the title has undergone examination, the particular cases in which the evidence is not to be required may be stated, or the general clause framed so as to extend to them.J.]

Title of lands should always be investigated previously to sale.

[J. A practice has much prevailed of late years, especially in sales by auction, of providing that the purchaser shall not require more than a certain extent or range of title, and this has been in some instances carried so far, as to preclude him from calling for the production of the title antecedently to a very recent period, as the vendor's conveyance or a late inclosure act, &c., so that the purchaser has scarcely more than the mere possession of the property, and that *primâ facie* evidence of ownership which possession carries. It is extraordinary, that persons should so readily purchase under stipulations of this nature, which deprive them of the means of ascertaining that what they have purchased really belongs to the person who has dealt with it as his own. Where a vendor has himself no better title, the introduction of the restriction is, of course, accounted for in a manner much more satisfactory to a purchaser, than where there is a prior title which the vendor does not choose to disclose. Indeed, no person can honestly enter into a contract, precluding a purchaser from an opportunity of investigating the title when he is aware of a defect, by which the enjoyment of the property is endangered; and it is apprehended that a purchaser, not-

As to stipulations negativing the purchaser's right to call for title beyond a prescribed period.

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said [*vendor*] purchased certain other parts of the hereditaments and premises hereby contracted to be sold, of and from P. T., of &c., but no deeds or documents of title were delivered to the said [*vendor*], relating to, or shewing the nature of the title to a certain cottage, or dwelling-house, garden, and orchard, situate in or adjoining to ——, (part of such purchase), prior to the year ——, when the same was devised in fee to C. D. the father of the said P. T., from whom the same descended to the said P. T.; NOW THEREFORE IT IS HEREBY AGREED by and between the said [*vendor*] and [*vendee*]; that the said [*vendor*] shall not be obliged or required to produce or shew any documents or evidence of title to the said cottage, garden, and orchard, anterior to the said will: AND THE SAID [*vendee*] DOTH HEREBY ALSO AGREE to accept and take the covenant of the said P. T., as an indemnity against the annuity of £ ——, payable to [*annuitant*] for her life, under the said will, and charged and chargeable on the said hereditaments, and premises purchased of the said P. T., or some part thereof, with other hereditaments of great value. AND WHEREAS upon the investigation of the title to the lands and hereditaments hereby contracted to be sold, it appeared that certain parts thereof were, by indentures of lease and release, bearing date respectively the —— and —— days of 1759, conveyed and assured to trustees, in fee-simple, upon trusts which have long been satisfied, but no re-conveyance of the legal estate can be proved to have been executed; but the counsel for the said [*vendor*] is of opinion, that at this distance of time a reconveyance of the said hereditaments would be presumed to have been made (*a*); NOW IT IS HEREBY AGREED AND DECLARED, that the said [*vendee*], whether such opinion is well founded or not, shall not be entitled to call for, or require to be produced, any evidence of the said legal estate having been re-conveyed by the said trustees or their representatives, but shall rest satisfied with proof or evidence of the trusts or purposes for which the same was created being

Purchaser to accept title to a cottage commencing with a certain will.

Also to accept a certain indemnity against an annuity.

Purchaser to be at the expense (if required) of getting in outstanding legal estate, (a conveyance of which vendor is advised would be presumed).

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withstanding such an agreement, might shew, if he could, that the title was defective, and resist the performance of the contract on this ground. The *onus*, however, it should seem, would lie on him, and the means of discovering the defect are seldom in his power.J.]

(*a*) [As to the rules of presumption in these cases, *vide infra*, Vol. 6, p. 444.]

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determined or satisfied. AND WHEREAS it further appeared upon the said investigation of the title to the said hereditaments, that by an indenture of assignment, bearing date the —— day of ——, 1758, a certain term of one thousand years, created as therein recited, affecting a small part of the hereditaments hereby contracted to be sold, was assigned unto A. B., gentleman, upon trust to attend the inheritance, but no notice is taken of the said term in any of the subsequent title-deeds, nor can it be shewn that the same has been since assigned or surrendered; NOW IT IS HEREBY AGREED AND DECLARED, that if the said [*vendee*] shall be desirous of having the said term assigned to a trustee for him, all expenses attending the inquiry for, or discovery of, the personal representative of the said A. B., in whom the same is now outstanding, or of any limited or general administration that may be necessary for the purpose of constituting such personal representative, and all other expenses attending the obtaining an assignment of the said term, except so far as respects the execution thereof by the said [*vendor*], shall be paid and borne by the said [*vendee*]. AND WHEREAS by the settlement made on the marriage of the said [*vendor*], with his present wife, [*vendor's wife*], (formerly A. B., spinster), bearing date the —— and —— days of ——, certain lands and hereditaments therein comprised are limited, after the decease of the said [*vendor*], to the use of the said [*vendor's wife*] for her life, if she should so long continue his widow, in bar and satisfaction of her dower or thirds of and in any lands, tenements, and hereditaments, of which he, during the coverture, might be seised; NOW IT IS HEREBY AGREED AND DECLARED, by and between the said parties, that the said [*vendee*] shall not be entitled to call for, or require the said [*wife*], to join in the conveyance, or do any act for the purpose of barring or extinguishing her right or title to dower of or in all or any part of the hereditaments and premises hereby contracted to be sold or to require the title to be deduced to the lands and hereditaments settled upon the said [*vendor's wife*] as aforesaid, but shall rely upon and rest satisfied with a covenant for the production of the said indentures of lease and release or marriage settlement, as evidence of the said [*wife*] being barred of her dower or thirds, and right of dower or thirds, in or to all and every the hereditaments and premises here-

Purchaser bound to rely upon vendor's wife's jointure as a bar of dower.

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by contracted to be sold as aforesaid (*a*). AND IT IS ALSO AGREED, that no evidence shall be called for or required by

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(*a*) [J. Whether a purchaser in such a case as this is bound to rely upon the jointure, is a debateable point. The better opinion seems to be, that he is not, unless the title to the jointure lands be produced, because in the event of eviction from those lands, the wife's claim to dower would be let in upon the lands contracted to be sold. 2 Sugd. Vend., 10th Ed. 218. To prevent all dispute upon the point, it seems to be prudent to make it the subject of express stipulation.J.]

Whether a purchaser is bound to rely on a jointure as a bar of dower.

Whether a purchaser is bound to rely upon a term of years as a bar of dower.

Affirmative decided in *Mole* v. *Smith*.

[J. Another point, formerly much agitated between vendors and purchasers, was, whether a purchaser could be compelled to rely upon a term of years created antecedently to the inception of the wife's dower, as a protection against it. A modern determination, however, has set this question at rest, by establishing the affirmative. It appeared that in 1801 certain aliquot shares in the lands in question were purchased by, and conveyed to, W. in fee; and at the same time three satisfied mortgage terms of five hundred years, two thousand years, and two thousand years, were assigned to Y., a trustee for him to attend the inheritance. In 1802 W. conveyed the premises to O. in fee, by way of mortgage; and it was declared, that all persons in whom any satisfied terms were then vested, should stand possessed thereof in trust for the mortgagee; and for better securing the mortgage money. In 1808 a partition of the estate was made under a decree of the Court of Chancery, and the entirety in a part of it conveyed to O., subject to the equity of redemption in W. W. became bankrupt, and the plaintiffs, his assignees, now sold the premises allotted to W. on the partition to the defendant. The plaintiffs had paid off O.'s mortgage, and taken a conveyance from him. Y., the trustee of the term, was dead, *and W.'s wife had administered to his effects*, and in that character was now possessed of the terms in question. The question was, whether the purchaser was bound to accept an assignment of the terms in question, as a bar to the dower of this lady; and Lord *Eldon* decided that he was; and that the circumstance of their having become vested in her as administratrix, made no difference. She was a trustee for the plaintiffs, the assignees, and bound to assign the term to their assignee. *Mole* v. *Smith*, Jac. 490.J.]

Purchaser must rely upon an assignment of term as a bar of dower.

[J. In this case, the deeds creating the terms appear not to have been delivered up to the purchaser. Though the above case may be considered to have established that a purchaser is bound to rely upon a term of years as a protection against dower; yet, as the reasons for this proposition have not been satisfactory to the profession, and the point is even now the subject of much dispute between vendors and purchasers, it seems better, in cases where any difficulty is likely to occur, for a vendor to negative, by express stipulation, the purchaser's right to require the wife's concurrence. The objection to the doctrine of *Mole* v. *Smith* is, not only that it imposes upon a purchaser the necessity of keeping on foot the term for the purpose of excluding the dower, but that, if a writ of dower were sued out by the doweress, since she would have judgment for her dower, with a *cesset executio* dur-

13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

the said [*vendee*] to be produced of the birth, marriage, death, intestacy, or heirship of any person or persons, occurring in the title to the hereditaments and premises hereby contracted to be sold, nor of the survivorship of any trustee or other person, where such birth, marriage, death, intestacy, heirship, or survivorship, shall have been stated, recognised, or taken notice of, in any of the title-deeds affecting the said premises, or any part thereof, bearing date upwards of thirty years ago; neither shall the said [*vendee*], his heirs or assigns, be entitled to require that the award of the commissioners, appointed under the act or acts of Parliament for enclosing the commonable lands in the parish of —— aforesaid, shall be perfected before the completion of the said purchase, but shall accept a conveyance of the allotments set out for the said [*vendor*], by the said commissioners, notwithstanding the award shall not have been perfected (*a*); AND LASTLY, IT IS HEREBY AGREED AND DECLARED, that in case any error or mistake shall appear in the description of the parcels mentioned in the schedule to these presents, or in the nature or quantity of the vendor's interest therein, or any other error shall appear in respect thereof, such mistake shall not vacate the present contract, but a compensation shall be give or taken, as the case may require, such compensation to be estimated by two

Not to call for evidence of facts stated in deeds more than thirty years ago.

Purchaser not to require inclosure-award to be perfected.

Errors of description not to vitiate the contract, but compensation to be made.

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ing the term, the *terre-tenant* (*i. e.* the purchaser) would at least have to pay his own costs. On the other hand, it must be admitted that the probability of such a claim ever being set up is very slight, as it would be attended with expense to the claimant, without the possibility of any compensatory advantage. If, however, there is any ground to presume the surrender of the term, according to the case of *Doe* d. *Putland* v. *Hilder*, 1 Barn. & Ald. 687, and the other cases which have created so much discussion, of course the term is not to be relied on, for this or any other purpose. *Vide infra*, Vol. 6, p. 444. Now that a title to dower may be extinguished by a married woman without a fine, the points above discussed have lost much of their importance, as the additional expense occasioned by the wife's junction in the deed, and the consequent necessity of an acknowledgment; it is so trifling, it would seldom be made a subject of much contention on which party such expense should fall.[J.]

(*a*) [[J.] In *Kingsley* v. *Young*, 17 Ves. 463, Sir *Wm. Grant*, M. R., overruled an objection by a purchaser, that the award of the commissioners under an inclosure act had not been made, the act containing a clause giving validity to sales and conveyances before the award, and the purchaser (who was the tenant) having notice of all the circumstances.[J.]]

Purchaser held to be bound to complete, notwithstanding that an inclosure award had not been executed.

13. FOR SALE, WITH SPECIAL STIPULATIONS AS TO TITLE.

indifferent persons, one to be chosen by and on the part of the said [*vendor*], and the other by and on the part of the said [*vendee*], and in case of their disagreement, then by such third person as they shall for that purpose indifferently appoint, according to the usual course of arbitrations, with a clause of umpirage. IN WITNESS, &c.

Schedule.

FIRST SCHEDULE REFERRED TO BY THE BEFORE WRITTEN CONTRACT.

Names of Fields.	*Quality.*	*Quantity.*

SECOND SCHEDULE REFERRED TO BY THE BEFORE WRITTEN CONTRACT.[1]]

14. FOR THE PURCHASE OF A LEASEHOLD MESSUAGE.

[14. AGREEMENT *for the* PURCHASE *&c., of a* LEASEHOLD *Messuage &c., with Covenants* TO ASSIGN *the* LEASE *when found, it being* MISLAID. PURCHASE-MONEY *to be paid by* INSTALMENTS, *with Interest.*

ARTICLES OF AGREEMENT bearing date this —— day of ——, in the year 18—, BETWEEN [*vendor*], of &c., of the one part; and [*vendee*], of &c., of the other part.

Recital of vendor's interest;

WHEREAS the said [*vendor*] is possessed of, or entitled to a messuage or tenement numbered —— in —— street aforesaid, wherein the said [*vendor*] now resides, for the residue of a term of —— years or thereabouts, from the —— day of ——, at the clear yearly rent of £——, under a lease thereof, which at present cannot be found; *And also* to a coach-house and a four-stall stable, held by the same lease, at the clear yearly rent of £——; AND WHEREAS the said

of contract for sale.

[*vendee*] hath contracted with the said [*vendor*] for the purchase of all his right and interest in the said messuage or tenement, coach-house, stable, and premises, subject to the payment of the said rents, and all taxes and other outgoings payable for or in respect thereof respectively, in such and the like manner as he the said [*vendor*] now holds and enjoys the same, at and for the price or sum of £——, which it hath been agreed shall be paid in manner hereinafter mentioned. NOW THESE PRESENTS WITNESS, that in consideration of the sum of £—— of lawful money of the United Kingdom, paid by the said [*vendee*] to the said [*vendor*], at or before the sealing and delivery of these presents, the receipt whereof the said [*vendor*] doth hereby acknowledge, and also of the further sum of £ ——, the residue of the said purchase-money, or sum of £ ——, to be paid as hereinafter mentioned: he the said [*vendor*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*vendee*], his executors, administrators, and assigns, that he the said [*vendee*], his executors, administrators, or assigns, shall and may from the —— day of —— next ensuing, have, hold, occupy, possess, and enjoy, the said messuage or tenement, coach-house, stable, and premises, with the appurtenances, for all the residue of the said term of —— years, and for all such other term, estate, and interest as he the said [*vendor*] could or might have held or enjoyed the same in case these presents had not been made, without any let, suit, trouble, or molestation of, from, or by the said [*vendor*], his executors, or administrators, or any person or persons lawfully claiming or to claim, by, from, under, or in trust for him or them, *Subject* nevertheless to the payment of the said several yearly rents of £——, and £——, from the said —— day of —— next, during the continuance of the said term in the premises; *And also* subject to the payment of all taxes, charges, and other impositions already assessed or imposed, or which, during the continuance of the said term, shall be assessed or imposed upon the said premises, or any part thereof, from the said —— day of —— next, but free and exempt from all such rents, taxes, charges, and impositions, up to that day; and also that he the said [*vendor*], his executors or administrators, will as soon as the said lease can be had or found for the purpose, upon the request, and at the costs and charges of the said [*vendee*], his executors, administrators, or assigns,

14. FOR THE PURCHASE OF A LEASEHOLD MESSUAGE.

Testatum.

Covenant by vendor for quiet enjoyment by vendee;

subject to the rent and taxes;

and to assign the lease when found.

14. FOR THE PURCHASE OF A LEASEHOLD MESSUAGE.

and without any further consideration for the same beyond the said sum of £——, paid or to be paid as herein mentioned, deliver the said lease, and by sufficient assurances in the law, assign, and assure the same, and the premises therein comprised, for the residue of the term then unexpired therein unto the said [*vendee*], his executors, administrators, and assigns, or as he or they shall direct, subject nevertheless to the rent and covenants aforesaid: AND the said [*vendee*] doth hereby for himself, his heirs, executors, and administrators, covenant with said [*vendor*], his executors, administrators, and assigns, that, in consideration of the premises, he the said [*vendee*], his executors, administrators, or assigns, will pay to the said [*vendor*], his executors, administrators, or assigns, the said sum of £——, the residue of the said purchase-money, or sum of £——, in manner following, that is to say, the sum of £——, part thereof, on the —— day of ——, and the sum of £——, the residue thereof, on the ——day of ——, with interest, at the rate of £5 per cent. (*a*) on the said several instalments, from the —— day of ——, when possession of the said premises is to be delivered to the said [*vendee*]: *And* that he the said [*vendee*], his executors, administrators, or assigns, will, from time to time, and at all times, from and after the said —— day of —— during the residue of the said term in the premises, pay or cause to be paid the said several yearly rents of £—— and £——, when and as the same shall become payable, and will perform the covenants in the said indenture of lease, and which, on the part of the lessee therein named, ought to be performed; and from the said yearly rents and covenants, and all taxes, charges, and assessments, and impositions, which, from the said —— day of ——, shall be assessed and imposed in respect of the said premises, or any part thereof, will effectually keep indemnified the said [*vendor*], his heirs, executors, and administrators, and his and their lands and tenements, goods and chattels, respectively for ever; *And lastly*, it is hereby declared and agreed, by and between the said parties, that the covenant hereinbefore contained, on the part of the said [*vendor*], to deliver the said lease, and assign the said

Covenant by vendee to pay purchase-money.

And pay and perform rents and covenants of lease.

Covenants not to be dependent and conditional.

(*a*) [As to whether an agreement for the payment of "interest" on the purchase-money, or of money called by that name, at a greater rate than £5 per cent. would be usurious, see the preliminary article to the title BONDS.]

premises, and the said covenant of the said [*vendee*] to pay the residue of the said purchase-money, shall be, and be construed to be distinct and independent covenants, and not the one as dependent, or conditional, upon the performance of the other (*a*). In witness, &c.] 14. for the purchase of a leasehold messuage.

(*a*) [As to covenants being dependent, *vide post*, Vol. 4, p. 440.]

15. AGREEMENT *between two Vendors and a Purchaser, where* Money *to be paid on a Valuation of Timber is to be* invested *in the Funds in the Names of Trustees,* until a title can be made to a Part, *outstanding Terms assigned, and Title Deeds found; and in the mean Time, as an* Indemnity *to the* Purchaser. 15. on a purchase with a defective title.

ARTICLES OF AGREEMENT indented, made and agreed upon the —— day of ——, 18—, Between [*one of the vendors*], of &c., widow and relict, and sole executrix named and appointed in and by the last will and testament of [*testator*], late of the same place ——, deceased, and [*the other vendor*], of &c., and which [*vendors*] are the devisees in trust, named in the same will, of the one part; and [*purchaser*], of &c., of the other part. Parties.

WHEREAS by indentures of lease and release, by way of mortgage, bearing date respectively on or about the —— and —— days of ——, 17—, and made or expressed to be made between the said [*testator*], of the one part; and [*mortgagees*], of &c., of the other part; the said [*testator*], in consideration of the sum of £——, paid to him by the said [*mortgagees*], granted and released unto and to the use of the said [*mortgagees*], their heirs and assigns, a certain manor, or reputed manor, and other hereditaments and premises, situate, &c., subject nevertheless to a proviso for redemption on payment by the said [*testator*], his heirs, executors, or administrators, unto the said [*mortgagees*], or the Recital of mortgage in fee by husband to the trustees of his marriage settlement, on their transferring to him the trust funds.

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

survivor of them, or his executors, administrators, or assigns, of the said sum of £——, and interest thereon, at the rate of five pounds per centum per annum, on a day therein mentioned, and long since past: WHICH indenture of release contains a declaration by the said [*mortgagees*], that the said mortgage money was produced by the sale of £—— Consolidated three pounds per centum Annuities, transferred to them by virtue of an indenture, bearing date on or about the —— day of ——, 17—, being a settlement made previous to the marriage of the said [*testator*], deceased, with ——, his former wife; and that the said mortgage money was subject to the several trusts in such indenture of settlement contained respecting the said £—— Consolidated three pounds per centum Annuities. AND WHEREAS, by indentures of lease and release, indorsed on the above-recited indentures of lease and release, by way of mortgage, and bearing date respectively on or about the —— and —— days of ——, 17—, and made or mentioned to be made between the said [*surviving mortgagee*], of the one part, and [*daughters of testator*], of &c., of the other part; *reciting* the death of the said [*testator*], and ——, his former wife, leaving the said [*daughters*], their only children, who, as such, were entitled equally between them to the sum of £——, secured by the above-recited mortgage: *And also reciting* the death of the said [*deceased mortgagee*]; *And* that the said [*daughters*] had requested the said [*surviving mortgagee*] to assign the mortgage money, and convey the mortgaged premises to them; and which was accordingly done by the indentures of lease and release now in recital; *But subject* to such equity of redemption as was contained in the first recited indenture of release, of the —— day of ——, 17—: AND WHEREAS the said [*vendors*], as such devisees in trust as aforesaid, did lately contract and agree with [*agent for purchaser*], of &c., for the sale to him of the fee-simple and inheritance of *All that* the then lately newly-erected capital messuage or dwelling-house, with the garden and outhouses thereto belonging; *And also all that* the estate, manor, and demesne lands, farms, houses, lands, woodlands, underwoods, tenements, and hereditaments, to the said messuage, estate, and manor belonging, or in anywise appertaining, or therewith held, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof; *Together* also with

Recital of declaration, that mortgage money was trust money, and settled on the marriage of mortgagor with his late wife.

Recital of transfer of mortgage from trustee to two daughters, the only children of the marriage.

Recital of contract for purchase.

Parcels.

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

the portion of two-thirds of tithes in and upon certain parts of the said demesne lands containing about —— acres; *Which* tithes were described to be then lately purchased by the said [*testator*], deceased, of [A. B.]; *And* which manor, hereditaments, and premises, were, by a printed particular, mentioned to be annexed to, and referred to by the contract now in recital, described to be situated in the county of ——, with the appurtenances, free from incumbrances, (*except* a yearly rent of —— shillings, payable by way of fee farm-rent), at or for the price or sum of £ ——: *And* it was thereby further agreed, that the said [*agent for purchaser*] should further pay to the said [*vendors*], their heirs or assigns, for all the timber, including the bark, and tops and lops, growing upon the whole of the estate and premises, as the same should be measured and valued by two indifferent persons or their umpire, one of such indifferent persons to be chosen by the said [*vendors*], and the other by the said [*agent for purchaser*]; in which measurement and valuation all timber trees and saplings growing on the said premises, which were of the value of one shilling, or above that value, were to be estimated according to the usual manner and custom of valuing timber. AND WHEREAS the said contract so made by the said [*agent for purchaser*] was so made and entered into by him on the behalf of and in trust for the said [*purchaser*]. AND WHEREAS the said manor or reputed manor, newly-erected capital messuage, and other messuages, tenements, farms, lands, woodlands, hereditaments, and premises, contracted to be sold as aforesaid, comprised all the said manor, hereditaments, and premises, so mortgaged by the said [*testator*] as aforesaid, *Except* such part of the lands belonging to the same as had been conveyed or agreed to be conveyed by the said [*testator*], deceased, in his lifetime, and after making the above-recited mortgage as aforesaid to the said [A. B.], in exchange for the said portion of tithes included in the above-recited contract for sale; and also for all those several pieces or parcels of arable land, situate, lying, and being dispersedly in the common fields of ——, and within the manor of —— aforesaid, containing by estimation —— acres, —— roods, and —— perches, (more or less), then or then lately in the possession of ——, under or by virtue of a copyhold or customary grant thereof, for lives, which same —— acres, —— roods, and —— perches, were likewise included in such contract for sale.

Recital of agreement, that timber should be valued.

Recital, that contract was made by agent on behalf of principal.

Recital, that the premises contracted to be purchased comprised all the premises mortgaged by the testator, *except* such part as he had afterwards conveyed in exchange for tithes and lands.

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

Recital of defect in title to tithes and lands taken in exchange.

Recital of agreement, that a conveyance should be made of the other parts;

AND WHEREAS upon investigating the title to the said two-third parts of tithes, and the said —— acres, —— roods, and —— perches of commonable land, it appears that the same is either defective or cannot at present be made good; *And therefore* it hath been agreed between the parties hereto, that a conveyance shall now be taken of the said manor, or reputed manor, newly-erected capital messuage, and other messuages, tenements, farms, lands, woodlands, hereditaments, and premises, comprised in the said indentures of mortgage, of the —— and —— days of ——, 17—, and being the whole of the premises thereby mortgaged, (except as aforesaid), unto and to the use of, and in trust for the said [*purchaser*], his heirs and assigns: *But* that no conveyance shall now be taken of the said portion of tithes and commonable land so had in exchange as aforesaid, on account of the title thereto not being at present made good as aforesaid; *Although* it hath nevertheless been agreed that the said [*purchaser*] shall immediately enter into and be entitled to the rents, issues, and profits, and become possessed of the same respectively. AND WHEREAS it hath been agreed by and between the said [*vendors*], and the said [*purchaser*], that the sum of £—— mentioned in the above-recited contract, shall be immediately paid, pursuant to the terms thereof; *And* that the timber and wood thereby agreed to be measured and valued, shall be measured and valued accordingly, before the —— day of —— next ensuing the date hereof; and the amount of the valuation paid as hereinafter mentioned: AND WHEREAS it also appears that there are two terms of two hundred years and five hundred years, comprising the manor, hereditaments, and premises so mortgaged by the said [*testator*], deceased, to the said [*mortgagees*], as hereinbefore recited; the term of two hundred years, created by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 17—, by way of settlement, on the marriage of [C. D.] and [E. F.] therein respectively described; *And* the said term of five hundred years, created by indenture of demise or mortgage, bearing date on or about the —— day of ——, 17—, made by the said [C. D.] to [G. H.] and [I. K.] therein respectively described, for securing the sum of £—— and interest; *And* there being no evidence of such terms ever having been assigned to attend the inheritance of the premises, expectant thereon, it hath been required,

but no conveyance to be made of tithes and lands taken in exchange.

Yet purchaser to be entitled to the beneficial enjoyment thereof.

Recital of agreement that purchase-money should be paid, and timber valued, and paid for as aftermentioned.

Recital of two satisfied terms for years;

which had not been assigned to attend the inheritance,

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

on the part of the said [*purchaser*], that the same shall be regularly assigned to a trustee or trustees of his own nomination, for his use, and to attend the inheritance of such parts of the same premises as have been contracted to be purchased by him as aforesaid; *But* by reason of its being difficult to find the legal personal representatives of the respective persons in whom the said two several terms were originally vested; and as it will require some time to get the said assignments made, it hath been proposed and agreed, by or on the behalf of the said [*vendors*], to enter into a covenant for drocuring the requisite assignments thereof, in manner hereinafter mentioned: AND WHEREAS it likewise appeareth that an indenture of mortgage, bearing date on or about the —— day of ——, 17—, and made between &c., and whatsoever assignments thereof had been made and executed between the said date of such mortgage and the —— day of ——, 17—, when an assignment of the same was made to the said [*testator*], deceased, are not amongst the title deeds belonging to the said manor and estate of ——, but are alleged to have been lost or mislaid, and therefore cannot now be delivered to the said [*purchaser*]; on which account it hath been agreed that the said [*purchaser*] shall be indemnified as hereinafter mentioned: AND WHEREAS, by indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing even date with these presents, and made or expressed to be made between the said [*daughters*], therein described, of the first part; the said [*vendors*], of the second part; the said [*agent for purchaser*], of the third part; the said [*purchaser*], of the fourth part; and [*trustee to prevent dower*], therein described, of the fifth part; the said manor or reputed manor, newly-erected capital messuage, and such of the said hereditaments comprised in the above-recited indentures of mortgage, of the —— and —— days of ——, 17—, as were, with the said portion of tithes and commonable land, agreed to be purchased by the said [*agent for purchaser*], as aforesaid, Have, in consideration of the said principal sum of [*mortgage money*] (all interest thereon having been previously paid to the said [*daughters*], parties thereto), expressed to be paid by the said [*purchaser*], and of the sum of £——, (making together the said sum of [*purchase money*]) to the said [*ven-*

and which the purchaser required;

but on account of difficulty in finding termors' personal representatives, vendors agreed to enter into present covenant.

Recital, that part of title deeds was missing, and that purchaser should be indemnified on that account.

Recital of conveyance to purchaser.

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

dors], expressed to be also paid by the said [*purchaser*]; been conveyed and assured, or intended to be conveyed and assured, (with the consent of the said [*agent for purchaser*]), *To the use* of, or in trust for, the said [*purchaser*], his heirs, appointees, and assigns, for ever. NOW THESE PRESENTS WITNESS, that in pursuance of the above-recited agreement, IT IS HEREBY MUTUALLY COVENANTED, DECLARED, AND AGREED, by and between the said parties hereto, *That* the said timber and wood upon the manor, estate, and premises so conveyed or assured, or intended to be conveyed or assured, to the use of, or in trust for, the said [*purchaser*], his heirs, appointees, and assigns as aforesaid, shall be measured and valued (*a*), by or before the —— day of —— next ensuing the date hereof, according to the mode prescribed by the above-recited contract, and the amount of such valuation shall be paid or invested and applied in manner following, that is to say; *In case* a good, sure, and indefeasible title be made out and perfected, to the said two-third parts of tithes, and the said —— acres, —— roods, and —— perches of commonable land, by the said —— day of —— next, and the same premises should by that time be conveyed and assured to him the said [*purchaser*], his heirs or assigns, or to such person or persons as he or they should direct or appoint: *And also* in case the said two outstanding terms of two hundred years, and five hundred years, if existing, be regularly assigned by two separate deeds, to a trustee or trustees nominated by the said [*purchaser*], his heirs, appointees, or assigns: *And* if the said mortgage deed of the —— day of ——, 17—, and all the missing assignments thereof, be found and delivered to the said [*purchaser*], his heirs, appointees, or assigns, or proper and effectual releases, or acknowledgments, or other legal evidence be produced to shew that the debt secured by the said indenture of mortgage of the —— day of ——, 17—, was paid off and discharged: *And* that the said assignment of the —— day of ——, 17—, was made and executed by the persons entitled to assign such mortgage, and was for the absolute use and benefit of him or them, by or before that time: *Then* he the

Testatum.

Agreement that timber shall be valued and the money invested;

and if a good title be made to tithes and lands taken in exchange by a given day;

outstanding terms assigned; and mortgage deed and missing assignments delivered;

or evidence produced to shew that they are no incumbrances;

then purchaser to pay the

(*a*) [The Court will not enforce the specific performance of an agreement to sell at a valuation, if the price fixed appears to be considerably below the real value. *Parken* v. *Whitby*, Turn. & Russ. 366.]

said [*purchaser*], his executors, administrators, or assigns, shall, on such —— day of —— next, pay the full amount of such valuation to the said [*vendors*], their heirs, executors, administrators, or assigns, without any deduction whatsoever: *But* in case the said title to the said portion of tithes and commonable lands should not clearly, and to the satisfaction of the said [*purchaser*], his heirs, appointees, or assigns, be made out and perfected by the said —— day of —— next; *or* the said two terms of two hundred years, and five hundred years, or either of them, should on that day remain unassigned as aforesaid; *or* the same mortgage deed of the —— day of ——, 17—, and all missing assignments, should not be delivered to the said [*purchaser*], his heirs, appointees, or assigns, as aforesaid; or such sufficient releases or acknowledgments as aforesaid, or the evidence before mentioned, should not be produced; *Then* and in each, or any, of such cases, he the said [*purchaser*], his executors or administrators, shall lay out or invest the amount of the said valuation of timber, in the purchase of three pounds per centum Consolidated Annuities in the names of mutual trustees; who shall from time to time lay out and accumulate the dividends and interest thereof, *And* stand possessed of and interested in the stock so to be purchased, and the accumulations so to be made as aforesaid; UPON THE TRUSTS following, that is to say, *Upon trust*, in case the said title to the said portion of tithes and commonable land should be so as aforesaid made out by the —— day of ——, 18—, and the said [*purchaser*], his heirs, appointees, or assigns, should have been suffered to hold and enjoy the same, and to receive the rents, issues, and profits thereof, in the mean time, for his and their own use and benefit, and should have had the said two terms of two hundred years and five hundred years, if existing, assigned in trust for him or them as aforesaid, and the said mortgage of the —— day of ——, 17—, and the missing assignments thereof, or the releases or acknowledgment before mentioned, delivered over to him, or such legal evidence produced as aforesaid; *To* transfer the said stock so to be bought, and the dividends in the mean time arising therefrom, unto them the said [*vendors*], their heirs, executors, administrators, or assigns: *But* if such title should not be made out and perfected by the said —— day of ——, 18—; *Then upon Trust*, to transfer

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

amount of such valuation to the vendors.

But in case all the defects are not cleared by the given day,

purchaser to invest the amount of the valuation of the timber in 3 per cent. Consols. in the names of mutual trustees to accumulate;

Upon trust, in case defects are cleared by an extended certain day, and purchaser should peaceably enjoy in the mean time,

to transfer the stock and the dividends to vendors,

But otherwise,

Upon trust to

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

transfer to purchaser so much of the stock as the titles and lands shall be valued at, with purchaser's expenses;

to the said [*purchaser*], his heirs, appointees, or assigns, so much of the said stock and dividends as will produce such a sum as the said portion of tithes and commonable lands shall be valued at, by two indifferent persons, who are to estimate the value according to the relative situation of the same, and considering that the said [*purchaser*] is owner of the said manor and estates: one of such indifferent persons to be named by the said [*vendors*], their heirs or assigns, and the other by the said [*purchaser*], his heirs, appointees, or assigns: *And* in case of such two persons not agreeing, then by a third person, to be chosen by the two persons so first chosen for that purpose; *Together* with any expenses that the said [*purchaser*], his heirs, appointees, or assigns, may be in the mean time put unto, in consequence of his not having his title now completed thereto: *And* the residue of the said stock and dividends (provided the same two terms should be previously assigned, if existing, and the missing deeds or releases, or acknowledgments delivered as aforesaid, or such evidence as aforesaid produced), shall be thereupon immediately transferred to them the said [*vendors*], their executors, administrators, or assigns; *But*, if it should happen that the said two terms of two hundred years and five hundred years, if existing, or either of them, should be still unassigned in trust for the said [*purchaser*], his heirs, appointees, or assigns, as aforesaid; or the said mortgage deed of the —— day of ——, 17—, and the missing assignments thereof, or any or either of them, or the releases or acknowledgments before mentioned, should not be delivered to him or them, or such legal evidence produced as aforesaid, on the said —— day of ——, 18—, *Then* such residue to remain vested in the trustees to be named as aforesaid, as an indemnity to the said [*purchaser*], his heirs, appointees, and assigns, against any loss or damage which he or they might or may otherwise sustain, by reason of the said two terms remaining unassigned in trust for him and them as aforesaid, until both the said terms shall be assigned to a person or persons to be nominated by the said [*purchaser*], his heirs, appointees, or assigns, and to attend the inheritance, in case the same terms are now existing; *And also* as an indemnity to the said [*purchaser*], his heirs, appointees, or assigns, against any loss or damage which he or they might or otherwise may sustain, by reason or in

and the residue of the stock and dividends, if title should be cleared, paid to vendors.

But if not,

then residue of stock to remain in trustees as an indemnity to purchaser.

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

consequence of the said mortgage deed of the —— day of ——, 17—, or any subsequent assignments, not being now delivered to the said [*purchaser*] as a satisfied security, or otherwise on account thereof, until all the same missing deeds, or the releases, acknowledgments, or evidences before mentioned, shall be delivered or produced as aforesaid: *And* upon those things being severally done, *or* in case the same terms be not in existence, *Then* upon the last-mentioned indemnity being rendered unnecessary, and upon the said [*purchaser*], his heirs, appointees, or assigns, being reimbursed all damages and expenses, if any, which he or they may have sustained by reason of the said terms not having been assigned to the said [*purchaser*], his heirs, appointees, and assigns, and of the non-delivery of the same missing deeds upon the execution of these presents, or in any manner respecting the same deeds, such trustees may lawfully, and are hereby authorised to, transfer the same stock and dividends to the said [*vendors*], their executors, administrators, or assigns. AND if it should happen that a good, sure, and indefeasible title shall be made out and perfected to the said two-third parts of tithes, and the said —— acres, —— roods, and —— perches of commonable land, by the said —— day of ——, 18—, but the said two terms, or one of them, shall then remain unassigned in trust for the said [*purchaser*], his heirs, appointees, or assigns, as aforesaid; *or* the said missing deeds, or any of them, shall not be delivered as aforesaid; *or* the releases, acknowledgments, or evidences, shall not be delivered or produced as aforesaid; *Then* the said stock and dividends shall, notwithstanding such title being made as aforesaid, remain vested in the trustees to be named as aforesaid, as an indemnity to the said [*purchaser*], his heirs, appointees, and assigns, against any loss or damage which he or they might or may otherwise sustain, by reason of the said two terms remaining unassigned in trust for him and them as aforesaid, until both the same terms shall be assigned to a person or persons to be nominated by the said [*purchaser*], his heirs, appointees, or assigns, and to attend the inheritance; *And also* as an indemnity to the said [*purchaser*], his heirs, appointees, or assigns, against any loss or damage which he or they might or may otherwise sustain in consequence of the said mortgage deed of the —— day of —— 17—, or any subsequent assignment thereof, not being now delivered to the said

When indemnity is rendered unnecessary, and purchaser reimbursed all damages on account of defect to transfer stock to vendors.

If the first defect be cleared, still the whole funds to be invested as an indemnity against the other defects.

15. ON A PURCHASE WITH A DEFECTIVE TITLE.

[*purchaser*], as a satisfied security, or otherwise on account thereof, until all the same missing deeds, or the releases, acknowledgment, or evidence before mentioned, shall be delivered or produced as aforesaid. AND upon those several things being done, and the said [*vendor*], his heirs, appointees, or assigns, being reimbursed all damages and expenses, if any, which he or they may have sustained, by reason of the said terms not having been assigned in trust for the said [*purchaser*], his heirs, appointees, or assigns, upon the execution of these presents, or by reason of the said mortgage of the —— day of ——, 17—, and any assignments not being delivered as aforesaid as satisfied securities, such trustees may lawfully, and are hereby authorised to, transfer the same to the said [*vendors*], their executors, administrators, or assigns. AND THE SAID [*vendors*] do hereby for themselves, jointly and severally, and for their respective heirs, executors, and administrators, covenant, promise, and agree, to and with the said [*purchaser*], his heirs and assigns, That they the said [*vendors*], or one of them, his or her heirs, executors, or administrators, will or shall, at his or her own expense, by or before the —— day of ——, 18—, procure the said two several terms of two hundred years and five hundred years, so far as the same respects the premises in and by the above recited indenture of release, bearing even date with these presents, granted and released, to be legally and effectually assigned unto such person or persons as he the said [*purchaser*], his heirs, appointees, or assigns, shall for that purpose nominate and appoint, *Upon trust* for the said [*purchaser*], his heirs, appointees, and assigns, and to attend the reversion, freehold, and inheritance of the same premises, in order to protect the same from all mesne charges and incumbrances, if any such there be; *And also* will or shall forthwith use their utmost endeavours to find the said mortgage of the —— day of ——, 17—, and all missing assignments thereof, and upon the same deeds, or any of them, being found, will or shall immediately deliver them to the said [*purchaser*], his heirs, appointees, or assigns, for his or their own use and benefit. IN WITNESS, &c.

Covenant by vendors to procure the two terms to be assigned, upon trust for purchaser, his heirs, appointees, and assigns;

and to use their utmost endeavours to find the deeds missing, and deliver them to purchaser.

16. AGREEMENT *by a vendor to* REPURCHASE *Premises if required by the Purchaser within a limited Period, in case the* TITLE-DEEDS *are* NOT FOUND *in the mean time.*

16. TO REPURCHASE IF TITLE-DEEDS ARE NOT FOUND.

ARTICLES OF AGREEMENT, *indented*, made, and entered into the —— day of ——, in the year of our Lord, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*] of &c., of the other part. Parties.

WHEREAS the said [*purchaser*] hath purchased of the said [*vendor*] a certain messuage or tenement, garden, and premises, situate at —— in the county of ——, and the inheritance thereof in fee-simple, at or for the price or sum of £——; *And* by indentures of lease and release, bearing date on or about the —— and —— days of —— instant, and made between the said [*vendor*] of the one part, and the said [*purchaser*] of the other part; the said [*vendor*] hath, in consideration of the said sum of £——, granted, released, and conveyed, or otherwise assured the said messuage or tenement, garden and premises, with their appurtenances, unto the said [*purchaser*], his heirs and assigns: AND WHEREAS the title-deeds and writings relating to the said premises have been lost or mislaid; and previously to the completion of the said purchase, and payment of the said sum of £——, the consideration for the purchase thereof, it was agreed between the said parties, that in case the said [*purchaser*], his heirs, appointees, or assigns, should at any time after the expiration of the term of three years, and within the term of nine years, to be computed from the date hereof, be desirous of selling the said premises, at or for the price or sum of [*purchase-money*]; and in case the said [*purchaser*], his heirs, appointees, or assigns, should give unto the said [*vendor*], his heirs, executors, or administrators, six calendar months' notice of such desire, then and in such case the said [*vendor*], his heirs, executors, or administrators, should, at the expiration of the said six calendar

Recital of purchase, and conveyance in fee.

Recital of the loss of title-deeds, and agreement for repurchase, in case they should not be found within a limited period.

16. TO REPURCHASE IF TITLE-DEEDS ARE NOT FOUND.

months for which such notice should be given, if the whole of the said deeds and writings should not have been previously found and delivered to the said [*purchaser*], his heirs, appointees, or assigns, repurchase the same premises, at or for the price or sum of [*purchase-money*]. NOW THESE PRESENTS WITNESS, *and it is hereby agreed and declared* between and by the parties hereto, and the said [*vendor*] for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*], his heirs, appointees, and assigns, That in case the said [*purchaser*], his heirs, appointees, or assigns, shall at any time after the expiration of three years, and within the space or term of nine years, to be computed from the date hereof, be minded and desirous to sell the said messuage or tenement, garden, and premises comprised in the said indenture of release, bearing even date herewith, and of such his or their desire shall give unto the said [*vendor*], his heirs, executors, or administrators, or leave at his or their usual place of residence, six calendar months' notice in writing, Then and in such case, and at the expiration of the six calendar months for which such notice shall be given, if the deeds and writings mentioned in the first schedule hereunder written should not previously thereto have been found, and delivered to the said [*purchaser*], his heirs, appointees, or assigns, whole and undefaced, he the said [*vendor*], his heirs, executors, or administrators, will or shall purchase the said messuage or tenement, garden and premises, of and from the said [*purchaser*], his heirs, appointees, or assigns, at or for the price or sum of £——: AND THE SAID [*purchaser*] doth hereby agree that, on payment of the said sum of £——, pursuant to the aforesaid agreement, he the said [*purchaser*], his heirs, appointees, or assigns, and all other persons claiming through or under him, will and shall, at the request, costs, and charges of the said [*vendor*], his heirs, executors, or administrators, convey and assure the said messuage or tenement, garden and premises, with the appurtenances, unto and to the use of the said [*vendor*] and his heirs, or as he or they shall direct or appoint, free from all incumbrances made, done, or committed by the said [*purchaser*], his heirs, appointees, or assigns: *And further*, that in case the said [*vendor*], his heirs, executors, or administrators, shall be called upon to repurchase the said messuage or tenement, garden and premises, in pursuance

Testatum.

Covenant by vendor, that if purchaser should require him to purchase premises within a limited period, before the deeds are found,

he will purchase accordingly, at the sum now paid by purchaser.

Agreement by purchaser to convey accordingly.

Premises at the time of repurchase to be in good repair,

of the agreement hereinbefore for that purpose contained, the same premises shall, at the time of such repurchase, be in good and tenantable repair; *And*, upon the completion of such purchase, the same premises, together with the several fixtures mentioned in the second schedule hereunder written, shall be delivered to the said [*vendor*], his heirs or assigns, in as good order and condition, in all respects, as the same now are: PROVIDED ALWAYS, that these presents shall not, nor shall the above-recited indentures of lease and release be considered, construed, or taken to be a mortgage or security for money, or any thing in the nature of a mortgage or security for money; nor shall the same give, or be construed to give unto the said [*vendor*], his heirs, executors, administrators, or assigns, any right, title, or equity, to redeem the said premises, upon payment of the said purchase-money or sum of £——, with interest: PROVIDED ALSO, that in case the deeds and writings mentioned in the first schedule hereunder written, shall, previously to any such notice as aforesaid, or to the expiration of the said six calendar months, for which such notice shall be given or left as aforesaid, be found and delivered to the said [*purchaser*], his heirs, appointees, or assigns, whole and undefaced; Then, and in such case, these presents, and every thing herein contained shall cease, determine, and be void: IN WITNESS whereof the parties above named have hereto set their hands and seals, the day and year first above written.

16. TO REPURCHASE IF TITLE-DEEDS ARE NOT FOUND.

and fixtures in schedule in as good state as at present.

Agreement not to be deemed a mortgage.

In case the deeds should be delivered, agreement to be void.

THE FIRST SCHEDULE TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

THE SECOND SCHEDULE TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

17. AGREEMENT *between the Vendors and Purchaser of an Estate in Fee-simple,* TO REFER TO ARBITRATION *or Umpirage, the Question whether certain* LANDS WERE INCLUDED IN THE CONTRACT; *and what* COMPENSATION *the Vendors should receive in consequence of part of the Premises being discovered to be of a Leasehold instead of a Freehold Tenure: (very specially drawn).*

Parties.

ARTICLES OF AGREEMENT, indented, made, and concluded the —— day of ——, 18—, BETWEEN [*three vendors*], of &c., (devisees in trust, and executors named in the last will and testament of [*testator*], late of &c., esquire, deceased), of the one part; and [*purchaser*], of &c., of the other part.

Recital of contract for sale of certain premises in fee.

WHEREAS the said [*vendors*], as devisees in trust as aforesaid, did in or about the year 18—, by writing under their hands, contract with the said [*purchaser*] for the absolute sale to him of the several manors of —— and ——; and of divers farms, lands, tenements, and other hereditaments, situate or being in or near the county of ——, and the inheritance thereof, in fee-simple, at or for the price or sum of £——; *Among* which hereditaments so contracted to be sold are included a farm and lands called Acre Farm; and also certain lands called Evergreen Lands; and also a house and gate-room hereinafter mentioned; which sale so made to the said [*purchaser*] hath not yet been completed. AND WHEREAS the whole of the said farm and lands called Acre Farm, and now let upon lease, under the yearly rent of £——, is included in the contract for the sale, so agreed to be made to the said [*purchaser*] as aforesaid; and as the said [*purchaser*], at the special instance and request of the said [*vendors*], hath consented and agreed, that such part of the said farm called Acre Farm, and containing —— acres, —— roods, and —— perches, or thereabouts, as is specified in the schedule hereunder written, shall be discharged from the above-recited contract, in consideration that the said [*purchaser*] shall be allowed out of the said purchase-money a compensation for the loss of the said —— acres, —— roods,

Recital of agreement to relinquish part of premises, and allow proportion of rent, on having a compensation.

and —— perches of land, the purchase of which shall be so relinquished by the said [*purchaser*] as aforesaid: and that the said [*purchaser*] should have and be entitled to the yearly rent or sum of [*apportioned rent*], to be paid and payable in respect of the remaining part of the said farm and lands called Acre Farm, which is retained by, and intended to be conveyed to, the said [*purchaser*], as and for the apportioned part of the aforesaid yearly rent of [*whole rent*]. AND WHEREAS it hath been agreed between the said [*vendors*] and [*purchaser*], that the value of the lands mentioned and specified in the schedule hereunder written, being part of Acre Farm aforesaid, shall be ascertained by two indifferent persons, one of whom shall be chosen by the said [*vendors*] and the other of them by the said [*purchaser*]; and that in case such two persons shall not agree in their valuation, then the same shall be ascertained by such one person as the said two first referees shall for that purpose appoint; and the value of the said lands so to be ascertained shall be deducted by the said [*purchaser*], out of his said purchase-money by way of compensation. AND WHEREAS by indenture, dated on or about the —— day of ——, and made between [*one of the lessors*], of &c., widow, of the first part; [*the other lessor*], of &c., spinster of the second part; and [*lessee*], of &c., of the third part; *Reciting* a license bearing date the —— day of ——, under the hand of the deputy steward of the manor of ——, to the said [*first-named lessor*] to let to farm to the said [*lessee*] her moiety of the cottage at ——, in the manor aforesaid, for the term of twenty-one years from the feast of Saint Michael the Archangel then last, if the said [*first lessor*] should so long live; *And also* a license bearing date the —— day of ——, under the hand of the said deputy steward of the same manor, to the said [*first lessor*], to let to farm to the said [*lessee*], a moiety of one barn and gate-room, and half a yard of land, called the ——, containing —— acres; *And also* a moiety of a close of land called ——, containing —— acres; *And also* a moiety of those four closes of land, containing —— acres, called ——, in the manor aforesaid, for the term of twenty-one years from the feast of Saint Michael the Archangel then last, if the said [*first lessor*] should so long live; *And also*, a license bearing date the —— day ——, 17—, under the hand of the said deputy steward, to the said [*second lessor*], to let to farm unto the said [*lessee*] her moiety of the aforesaid cottage in ——,

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

Recital of agreement to leave value of premises relinquished to arbitration,

or umpirage.

Recital of lease of copyhold lands by two tenants in common for life for twenty-one years, if they should respectively so long live, with separate licenses of deputy steward.

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

for the term of twenty-one years from the feast of Saint Michael the Archangel then last, if the said [*second lessor*], should so long live; *And also*, a license bearing date the —— day of ——, under the hand of the said deputy steward, to the said [*second lessor*], to let to farm to the said [*lessee*] her moiety of the hereinbefore mentioned barn and gate-room, and half a yard of land called ——; *And also*, one moiety of a close of land called ——, containing —— acres; *And also*, a moiety of the said four closes of land called ——; for the term of twenty-one years from the feast of Saint Michael the Archangel then last past, if the said [*second lessor*] should so long live; *And further reciting*, that the said [*lessors*] were entitled to one moiety each of and in *All that* meadow or pasture ground, containing by estimation —— acres, lying and being in —— aforesaid, and then in the tenure or occupation of ——, during the term of their natural lives; *It was witnessed*, that the said [*lessors*] did demise, grant, and to farm let unto the said [*lessee*], *All* their aforesaid undivided moieties of and in the several copyhold messuages and tenements above mentioned; *And* all their aforesaid undivided moiety, or half part each, of and in *All that* meadow or pasture ground, above mentioned; All which premises were then in the tenures or occupations of the said [*lessee and others*]; *To hold* the same unto the said [*lessee*], his executors, administrators, and assigns, from the feast of Saint Michael the Archangel then last past, for the term of twenty-one years, if the said [*first lessor*] and [*second lessor*] should so long live; *At* the yearly rent of £——, payable half yearly, as therein mentioned; *And subject* to the covenants and agreements therein contained. AND WHEREAS the lease granted to the said [*lessee*], as aforesaid, was so granted to him in trust for the said [*testator*], deceased. AND WHEREAS the said [*purchaser*] contends, that the premises hereinbefore mentioned to be comprised in the said indenture of lease, of the —— day of ——, are included, or were intended to be comprised in the contract for sale, so made between him and the said [*vendors*], as aforesaid; *And* the said [*purchaser*] claims a compensation, to be deducted out of his said purchase-money, and the amount thereof to be settled as hereinafter mentioned, for the difference in value in the same premises, between a freehold and leasehold tenure; *But* as the premises are not by express words named in the said contract for sale, the said [*vendors*] con-

Recital, that lease was granted in trust for testator.

Recital of difference between vendors and purchaser, whether leaseholds were included in contract.

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

tend that the said leasehold premises do not, nor were intended to constitute any part of the estate so contracted to be sold to the [*purchaser*] as aforesaid. AND WHEREAS in order to put an end to all disputes between the said parties, touching the said leasehold premises, it hath been agreed between them, that it shall be left to two indifferent persons to determine, upon the statements of the parties, and upon such evidence or information, and by such other ways and means as they shall think proper, whether the aforesaid leasehold premises were originally intended, or ought, under the circumstances of the case, to be included or considered as included in the aforesaid contract; one of which persons is to be chosen by the said [*vendors*], and the other by the said [*purchaser*]; *And* in case such two persons cannot agree in their determination, then the same shall be referred to, and determined by such one person as the said two referees shall for that purpose appoint. AND WHEREAS a similar dispute has arisen between the said parties respecting a freehold piece or parcel of ground called the Coppice, near the ——, and containing —— acres, —— roods, and —— perches, it being contended by the said [*purchaser*], that the same is, or ought to be included in the said contract; and it hath been in like manner agreed, that it shall be left to the said two persons, or their umpire, to determine whether the same were originally intended, or ought, under the circumstances of the case, to be considered as included in the said contract. AND WHEREAS by indenture, dated on or about the —— day of ——, 16—, and made between [*lessor*], of the one part; and [*lessee*], of the other part, For the consideration therein expressed, the said [*lessor*] *Did* grant, bargain, sell, and demise unto the said [*lessee*], *All that* messuage or tenement, with the barn and gate-room thereunto adjoining and belonging, situate, lying, and being in the parish of ——, in the said county of ——, then late in the occupation of ——, with the appurtenances; *To hold* the same unto the said [*lessee*], his executors, administrators and assigns, for and during the term of five thousand years from the date thereof, under the yearly rent of a pepper-corn; *And* by mesne assignments and other acts, good and available in the law, the said messuage or tenement, with the barn and gate-room thereunto adjoining and belonging, became vested in the said [*testator*], deceased. AND WHEREAS by indenture dated on or about the —— day

Recital of agreement to refer same to arbitration,

or umpirage.

Recital of a similar dispute as to other lands.

Recital of agreement, to leave same to arbitration.

Recital of lease of other premises for five thousand years;

by mesne assignments vested in testator.

Recital of lease

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

of ——, and made between the Dean and Chapter of the Cathedral Church of ——, of the one part; and [*lessee*], of the other part; The said Dean and Chapter for the consideration therein mentioned, *Did* demise, grant, and to farm let, unto the said [*lessee*], *All that* barn, and all those several lands and tenements, with the appurtenances, called Evergreen, situate, lying, and being in the parish of ——, in the county of ——, containing by estimation —— acres, that is to say, *All those* two pieces of meadow ground, with a barn standing in one of them, lying between a meadow belonging to the manor of ——, on the north part, a meadow formerly of ——, deceased, on the north-west part, and a close of arable land, part of those lands called Evergreen, on the south-west part, containing by estimation —— acres, two closes of arable land, with a lane, there called Evergreen Lane, having —— park on the east, and one of the aforesaid two inclosures of meadow ground on the north part, and one of the last-mentioned two closes of arable on the east part, containing by estimation —— acres; *To hold* the same unto the said [*lessee*], her executors, administrators, and assigns, from the feast-day of Saint Michael the Archangel then last past, for the term of twenty-one years, *Under* the yearly rent, and subject to the covenants therein contained, and on the part of the lessee to be paid, done, and performed.

of other premises from a Dean and Chapter,

by mesne assignments vested in testator.

And whereas by mesne assurances and other acts, good and available in the law, the barn, lands, and premises, comprised in the lastly hereinbefore recited indenture of lease, became vested in the [*testator*], deceased, for the residue of the said term of twenty-one years.

Recital that premises comprised in two last recited leases are part of the premises contracted to be purchased as freehold

And whereas the premises hereinbefore mentioned to be comprised in the above recited indentures of the —— day of ——, 16—, and the —— day of ——, and the terms of five thousand years and twenty-one years, thereby respectively created, are admitted by the said [*vendors*] to form a part of the estate and hereditaments so contracted to be sold to the said [*purchaser*], as aforesaid: *But* inasmuch as the hereditaments so contracted to be purchased by the said [*purchaser*] were considered by him and the said [*vendors*] to be of a freehold tenure in fee-simple; and the amount of the consideration money to be paid by the said [*purchaser*], for the purchase of the same, having been calculated upon the supposition that the whole of the said estate and hereditaments were to be conveyed to him in fee-simple, it hath been agreed be-

Recital of agreement, to

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

tween the said parties hereto that the said [*purchaser*] shall be entitled to retain, by way of compensation out of his said purchase-money, the difference in value in respect to the premises comprised in the above recited indentures of demise or lease of the —— day of ——, 16—, and —— day of ——; and also in respect to the premises comprised in the said indenture of lease of the —— day of ——, in case it should be ultimately determined that the same ought to be considered as included in the said contract for sale as aforesaid, between the leasehold tenure, by which the same premises are respectively holden, and the inheritance in fee-simple of the same premises respectively; and that the amount of such difference in value shall be fixed and determined by two indifferent persons, one of whom shall be chosen by the said [*vendors*], and the other by the said [*purchaser*]; and that in case such two persons should not agree in their valuation, then the same shall be fixed and determined by such one person as the two first referees shall for that purpose appoint. AND WHEREAS, in pursuance of the said agreement, the said [*vendors*] have nominated [A. B.], of &c., and the said [*purchaser*] hath nominated [C. D.], of &c., referees, for the purpose of arbitrating and determining the said matters and things hereinbefore mentioned. NOW THESE PRESENTS WITNESS, that, in consideration of all and singular the premises, IT IS HEREBY AGREED AND DECLARED between and by the said parties hereto in manner following, that is to say; THAT the said [*arbitrators*] shall be arbitrators for determining the several matters and things in these presents referred to them, and that they shall determine the same respectively as soon as conveniently may be after the execution of these presents; AND THAT in case they should not agree to determine any matter or thing, matters or things, hereby referred to them, the matter or thing, matters or things, of which they shall not agree, shall be referred to and determined by such one person as they the said [*arbitrators*] shall for that purpose appoint; and such appointment of umpire to be from time to time made as soon as conveniently may be after such difference of opinion shall from time to time arise: THAT the value of the lands mentioned in the schedule hereunder written, being part of Acre Farm aforesaid, calculating such value at —— years' purchase, at the improved yearly rent thereof, shall be forthwith, as soon as may be ascertained

allow compensation on account of difference between leasehold and freehold tenure, and to leave same to arbitration or umpirage.

Recital of nomination of referees.

Testatum.

Appointment of arbitrators.

In case of difference, arbitrators to appoint umpire.

Land relinquished, to be calculated at —— years' purchase, by arbitrators or umpire.

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

and determined by the said [*arbitrators*]; or, in case they differ, by their umpire, to be chosen as aforesaid: THAT for the purpose of making such valuation, the said referees shall previously fix and determine, by such ways and means, and upon such information, as they or he shall think fit or deem proper, the best and most improved yearly rent at which the said lands mentioned in the said schedule ought to be, or to have been, or might have been, let at the date of these presents; and the calculation of such value shall be made upon such improved rent: THAT the value so to be fixed and ascertained by the said referees, or their umpire, shall be allowed to and retained by the said [*purchaser*] by and out of his said purchase-money, or sum of £——: AND THAT the said [*purchaser*], his heirs and assigns, shall be entitled to the yearly rent of [*apportioned rent*], as the apportioned part of the aforesaid yearly rent of [*whole rent*], to be payable in respect to so much and such part of Acre Farm aforesaid as are not mentioned and comprised in the said schedule hereunder written: THAT the said [*arbitrators*], or, in case they differ, their umpire, to be chosen as aforesaid, shall, as soon as conveniently may be after the execution of these presents, determine whether the leasehold premises hereinbefore mentioned to be comprised in the said indenture of lease of the —— day of ——, and the said freehold coppice near the ——, or either of them, and any and what part or parts thereof respectively, are or is, or ought to be considered as included in and bound by the said contract for sale so entered into between the said parties hereto as aforesaid: THAT the said [*arbitrators*], or in case they differ, their umpire, to be chosen as aforesaid, shall forthwith, as soon as may be, ascertain and determine what is the difference in value in respect to the premises holden under or by virtue of the said indentures of lease or demise of the —— day of ——, 16—, and the —— day of ——; and also in respect to the premises comprised in the said lease of the —— day of ——, in case the last-mentioned premises should be determined to be bound by and included in the said contract for sale as aforesaid between the leasehold tenures, under or by which the premises comprised in the same indentures are respectively holden, and the fee-simple of the same premises respectively: considering in the calculation of such difference in value, the duration of the several terms of years, and the rents, covenants, provisoes,

Improved annual rent to be ascertained,

and the value allowed purchaser.

Referees, or umpire, to ascertain land included in contract,

and determine difference in value, between leasehold and freehold tenure.

and agreements, under or by which the said leasehold premises are respectively holden, by virtue of the said indentures of lease respectively: THAT the amount and value so to be awarded, fixed, and determined as the difference in value between a leasehold tenure, and a freehold tenure in fee-simple, shall be retained and deducted by the said [*purchaser*], his heirs, executors, administrators, or assigns, by way of compensation, by and out of the said purchase-money or sum of £——: THAT the award and determination of the said [*arbitrators*], or of their umpire, in or about the premises, or any of them, shall be final and conclusive, between and upon the said [*vendors*], and all persons claiming through or under the said [*testator*], deceased, and the said [*purchaser*], his heirs, executors, administrators, and assigns: THAT for the purposes aforesaid, it shall be lawful for the said [*arbitrators*], or their umpire, to obtain information upon or in respect of the premises hereby referred, or any of them, either by the statements of the parties hereto, or any of them, by parol or written evidence, or by such other ways or means as they or he shall in their or his judgment think most advisable, or deem most applicable to the nature and circumstances of the case: THAT in case the said [*arbitrator*, A. B.] should die, or refuse or become incapable to act as arbitrator, before the whole of the premises hereby referred shall be determined by the said [*arbitrators*], or their umpire, *Then* the said [*vendors*], or the survivors or survivor of them, or the heirs, executors, administrators, or assigns of such survivor, shall forthwith thereafter nominate and appoint some other person to be arbitrator or referee in the stead and place of the said [A. B.]; and so in like manner upon the decease, or neglect or refusal to act, of any arbitrator succeeding to the place of the said [A. B] (*add a similar clause as to* [C. D. *purchaser's*] *arbitrator*): THAT every arbitrator, so to be appointed as a substitute for the said [A. B.] or [C. D.], or any succeeding arbitrator, shall, as to such of the premises as shall not, at the time of his nomination and appointment be actually determined, or referred to an umpire, have the same powers and authorities as are hereby vested in the arbitrator, in or to whose place he shall come or succeed: THAT the expense of preparing and executing these presents, (and a duplicate hereof), and of making such arbitration or award as aforesaid, or otherwise attending the submission hereby made, shall be borne and

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

Difference in value to be retained by the purchaser.

Award of arbitrators or umpire to be final.

Arbitrators or umpire to obtain evidence by parol, or in writing.

In case of death of vendors' arbitrator before award, they to appoint another.

Same as to purchaser's.

New arbitrators to have same powers as the old arbitrators.

Expense of arbitration to be paid equally.

17. ON PURCHASE, TO REFER DISPUTES TO ARBITRATION.

paid by the said parties in the proportions following, that is to say; one moiety thereof by the said [*vendors*], as trustees as aforesaid; and the other moiety by the said [*purchaser*]: AND LASTLY, the submission and agreement hereby made shall be made a rule of any of her Majesty's Courts of Law, at Westminster, on the application of either of the said parties. IN WITNESS whereof the said parties have hereto (interchangeably) set their hands and seals, the day and year first above written.

Submission to be made a rule of Court.

Schedule.

THE SCHEDULE TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

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18. FOR SALE OF MILL, &c. PARTLY IN CONSIDERATION OF ANNUITIES.

18. AGREEMENT *for the Sale of a* HOUSE, BAKEHOUSE, WATER GRIST-MILL, *and Premises, from two Vendors, in which a* SURETY *joins for the Purchaser, the Consideration being a* GROSS SUM *of Money, and* TWO LIFE ANNUITIES *to the Vendors, to be secured upon the Estate, and by the* BOND *of the Purchaser and four Sureties: the* FIXTURES *to be taken* AT A VALUATION: *and if Purchaser should die before the Conveyances are executed, the* SURETY *agrees* TO BECOME THE PURCHASER *upon the same Terms.*

Parties.

THIS AGREEMENT, made and entered into the —— day of ——, 18—; BETWEEN [*vendor*], of &c. and [*other vendor*], of &c., sister of the said [*vendor*] of the one part; and [*purchaser*], of &c., and [*surety*], of &c., of the other part;

Testatum.

WITNESSETH, that the said [*vendors*] have sold unto the said [*purchaser*], and that the said [*purchaser*], hath purchased of the said [*vendors*], in fee simple, ALL THAT messuage, bakehouse, and premises, situated at —— aforesaid, and now in the occupation of &c., AND ALSO all those water grist mills, mill-house, and premises, situate at ——, in the parish of ——, in the said county of ——; All which last-mentioned premises are now in the occupation, &c. AND

Parcels.

Price, a sum in

18. FOR SALE OF MILL, &c. PARTLY IN CONSIDERATION OF ANNUITIES.

the price agreed upon, for the purchase of the said premises, is the sum of £—— of lawful British money; *And* an annuity of £——, of like money, to be paid to the said [*vendor*] for his life; *And* another like annuity of £——, to be paid to the said [*other vendor*], for her life: *Which* sum of [*purchase-money*] is to be paid to the said [*vendor*] on or before the —— day of —— next, with interest, after the rate of five pounds per centum per annum, for the same, to commence from the —— day of —— next; *And* which respective annuities are also to commence from the said —— day of —— next, and to be payable quarterly, clear of all deductions whatsoever, with a proportionate part of the last quarterly payment of each of the said respective annuities, up to and until the respective days of the deaths of the said [*vendor*] and [*other vendor*]: AND the said respective annuities are to be secured upon the premises so agreed to be purchased, and by the joint and several bonds of the said [*purchaser*] and [*surety*], [*and three other sureties*]: THE dough, troughs, flour binns, and oven doors, of the bakehouse, and the different machinery and utensils belonging to the mills only, are to be included in the purchase, as part of the freehold: AND *it is further agreed* that the said [*purchaser*] shall take, at a valuation to be made by —— and ——, both of &c., [*auctioneers*]; and if they should disagree in their valuation, then by a third person, to be chosen by the said [*valuers*], all the brewing utensils and barrels, and the beer therein; and also the grates in the house; and the several kinds of fuel; and likewise the three horses and cart, at the mills and the hay-rick there; and all other the effects at the mills belonging to the said [*vendor*]; the amount of which valuation is to be paid by the said [*purchaser*] to the said [*vendor*] within the space of ten days next after the same shall be ascertained, and the said [*purchaser*] shall have notice thereof; *And* which valuation is to be made within five days from the date hereof, if the said [*valuers*], or their umpire can make the same within that time: AND *it is further agreed*, that the expenses of abstracts, and making out the title to the premises, and of securing the aforesaid annuities, and of the said annuity bonds, and registering the several memorials thereof, as well as the expenses of and attending the completion of the conveyance of the said premises, and the bond for the £——, hereinafter mentioned, shall be paid and defrayed by and at the equal costs of the

gross, and two annuities for lives of vendors.

The sum in gross to be paid on a given day, with interest, to commence on the same day as the annuities.

Annuities to be secured on premises and by bonds of purchaser, and his sureties.

Certain articles only to be included as part of the freehold.

Purchaser to take at a valuation by two persons, or umpire, all brewing, utensils, grates, &c.

Valuation to be made within five days.

Expenses of abstracts, &c. and securing annuities, &c. to be paid equally by vendor and purchaser;

18. FOR SALE OF MILL, &c. PARTLY IN CONSIDERATION OF ANNUITIES.

said [*vendor*] and the said [*purchaser*]; *But* the expense of a legacy receipt for the legacy to the said [*other vendor*], charged upon the said premises by her brother [A. B.'s] will, is to be paid by the said [*other vendor*] and [*vendor*], or one of them: AND *it is also agreed* by and between the said parties hereto, that the said [*purchaser*] shall enter upon the business of the bakehouse and mill on Monday next; *And* that the conveyance of the said premises, and the securities for the said annuities, shall be made and executed on or before the —— day of —— next; AND that the said [*purchaser*] and [*surety*] shall upon the execution of the said conveyance, give their joint and several bond to the said [*vendor*], for the due payment of the said [*purchase-money*], and the interest thereof, on or before the said —— day of —— next: *In which* bond the said [*purchaser*] and [*surety*] do hereby promise and agree with the said [*vendor*], that the said [*three other sureties*] shall, at the same time, join with them the said [*purchaser*] and surety: AND ALSO that a sum of not less than £—— shall, at the costs of the said [*purchaser*], be always kept assured, in the names of the said [*purchaser*] and [*vendor*], upon the said messuage, bakehouse, and premises in —— aforesaid; *And* that a sum of not less that £—— shall, at the like costs of the said [*purchaser*], be always kept assured in like manner upon the said water-mills, house, and premises thereto belonging, in the parish of ——, aforesaid, in one of the fire-assurance offices in London, during the lives of the said [*vendor*] and [*other vendor*] and the survivor of them, to be applied in rebuilding or repairing the said respective premises, if all, or any part of them, should be burnt down or damaged by fire in the mean time: AND for the better and more punctual performance of this agreement, on the part of the said [*purchaser*], they the said [*purchaser*] and [*surety*] do, and each of them doth hereby, for themselves and himself, their and his heirs, executors, administrators, and assigns, covenant and agree with the said [*vendors*], and each of them, and the executors, administrators, and assigns of them and each of them, that they the said [*purchaser*] and [*surety*], or one of them, or the executors, administrators, or assigns of them, or one of them, will or shall well and truly pay, fulfil, and perform such payments, conditions, and parts of the aforesaid agreement, which are or ought to be paid, done, and performed by and on the behalf of the said [*purchaser*], according to the true

Receipt for legacy, charged on estate, to be paid by vendors;

fine, if necessary, to be paid by vendor.

Purchaser to enter immediately, and conveyance, &c. to be made at a future period;

upon execution of which purchaser and surety to give bond;

and procure three others to join as sureties.

A certain sum to be insured on premises.

Agreement by purchaser and his surety to fulfil contract.

intent and meaning hereof; PROVIDED ALWAYS, that if the said [*purchaser*], should happen to die before the said conveyance shall be made and executed, *Then* the said premises shall be conveyed to the said [*surety*], in fee-simple, in the same manner, and under the same conditions, as by the former part of this agreement they are intended to be conveyed to the said [*purchaser*]. IN WITNESS whereof the said [*vendors*], and the said [*purchaser*], and [*surety*], have hereunto set their hands and seals, the said —— day of ——, 18—.

18. FOR SALE OF MILL, &c. PARTLY IN CONSIDERATION OF ANNUITIES.

If purchaser die before conveyance executed, then surety to complete purchase, &c.

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19. AGREEMENT *for Sale and Purchase of a* MANOR, FISHERY, &c., *in Fee (except a small part which is Leasehold): part of the Purchase Money is to be paid, and the remainder secured by the Bond of the Purchaser and a Mortgage of the Premises sold; or by Assignment of a Mortgage of other Premises, if the Trustees of the Marriage Settlement of the Vendor should be enabled to accept that security; and Agreement by Purchaser that Persons to be entitled under an intended settlement of the Estate purchased shall enter into a Bond for securing the regular Payment of the interest, during the Time they shall be in Possession: and the Vendor covenants to make out Title, &c. and procure Act of Parliament, if necessary: with special Provisions as to Errors in Description.*

19. FOR SALE IN FEE, PART OF THE MONEY SECURED BY MORTGAGE.

ARTICLES OF AGREEMENT indented, made, concluded, and fully agreed upon, this —— day of ——, 18—; BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Parties.

FIRST, the said [*vendor*] for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*purchaser*], his heirs and assigns, that he the said [*vendor*], or his heirs, and all other persons having any estate or interest in the hereditaments hereinafter mentioned, will and shall, on or before the fifth day of April next, by such conveyances and assurances in the law as counsel

Covenant by vendor to execute conveyances of premises before a certain day.

19. FOR SALE IN FEE, PART OF THE MONEY SECURED BY MORTGAGE.

shall advise, well and effectually convey and assure, unto and to the use of the said [*purchaser*], his heirs and assigns, or to whom he or they shall direct or appoint, in fee-simple (*Except* as to the leasehold close hereinafter described), and free from all incumbrances whatsoever: ALL THAT the manor of ——, in the said county of ——, with the rights, royalties, members, and appurtenances thereto belonging; *And also* ALL THAT the right of fishery in the river ——, of and belonging to the said [*vendor*]; *And also* ALL and singular the messuages, &c.; *All* which hereditaments and premises are freehold (save and except one close of land or ground, containing about —— acres, which is held by lease from &c.), and contain in the whole —— acres, —— roods, and —— perches, or thereabouts; *Together* with all and singular the rights, members, and appurtenances thereto belonging, (*Save and Except* a certain small piece of waste ground adjoining to and on the west of the said river ——, near to the water-mill in —— aforesaid, containing about —— roods): IN CONSIDERATION whereof, the said [*purchaser*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*vendor*], his heirs, executors, administrators, and assigns, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall well and truly pay or secure unto the said [*vendor*], his heirs, executors, administrators, or assigns, the sum of £—— of lawful British money, for the purchase of the manor, hereditaments, and premises before mentioned, in manner and form following; namely, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall well and truly pay or cause to be paid unto the said [*vendor*], his heirs, executors, administrators, or assigns (*a*), the sum of £——, in part thereof, on the said fifth day of April next, upon having such conveyances and assurances made and executed as aforesaid: AND that he the said [*purchaser*], his heirs, executors, administrators, or assigns, will or shall secure the further sum of £——, the remainder of the said

Parcels.

Right of fishery.

Except waste.

Covenant by purchaser to pay, or secure purchase-money, viz.

Part thereof upon execution of deeds,

and secure remainder by his bond and by a mortgage of the premises sold.

PREMISES SOLD IN SETTLEMENT, WITH POWER OF SALE, &c.

(*a*) If the premises sold be in settlement, with a power of sale, &c. say,

"or to the person or persons entitled to the receipt or payment of the said purchase-money,"

purchase-money, with interest thereon from the said fifth day of April, by the bond of the said [*purchaser*], and also, by a mortgage of the said manor, hereditaments, and premises, unto the said [*vendor*] (*b*) either in fee or for years, as his counsel shall advise; and to be made payable on the tenth day of October next (*c*): And *it is hereby further cove-*

19. FOR SALE IN FEE, PART OF THE MONEY SECURED BY MORTGAGE.

(*b*) If the premises sold are in settlement, &c., say,

PREMISES SOLD IN SETTLEMENT.

"or to his trustees,"

(*c*) If the residue be to be secured by assigning a mortgage of other premises, and the premises sold be in settlement, say,

Residue of purchase-money to be secured by assigning a mortgage of other premises,

"by assigning unto the said [*vendor*], his executors, administrators, or assigns, or to his [trustees], by such ways and means as counsel shall advise, a mortgage of certain estates of and belonging to [*mortgagor*], of &c., for securing the like sum of £—— unto the said [*purchaser*] (or to his trustees); [*Provided* that the said [*vendor,*] or his said trustees, are enabled to accept and take such assignment, as a security for the said sum of £——, part of the said purchase-money in obedience and conformity to the trusts of any existing settlement of the said manor, hereditaments, and premises, or otherwise]: And that he the said [*purchaser*], and the person and persons now in being, who shall be entitled to any estate in remainder of and in the said manor, hereditaments, and premises, under and by virtue of the conveyance to be made thereof, or the trusts of any intended settlement thereof, will and shall enter into a bond, with a sufficient penalty, unto the said [*vendor*], [or his said trustees], for securing and guarantying, during the time of their being respectively in possession of the said manor, hereditaments, and premises, the due and regular payment of the interest of the said sum of £——, at and after the rate of five pounds for one hundred pounds for a year, half-yearly, during the continuance of the same sum on that security under the person or persons who shall from time to time be entitled to receive the same interest, by virtue of such assignment; [But in case the said [*vendor*], [or his said trustees], should not be so enabled or authorised to accept and take such assignment of the said mortgage, as a security for the said sum of £——, and interest as aforesaid, *Then* he the said [*purchaser*], his heirs, executors, or administrators, will

if vendor or his trustees are enabled to accept same.

Purchaser, and those entitled under any settlement to be made of the estate sold, to give a bond for securing payment of interest on mortgage.

If vendor, or his trustees, should not be enabled to accept assignment of mortgage as a security, pur-

19. FOR SALE IN FEE, PART OF THE MONEY SECURED BY MORTGAGE.

nanted and agreed, that the said [*purchaser*], his heirs or assigns, shall enter into possession, and into the receipt of the rents and profits of the said manor, hereditaments, and premises, upon and from the said fifth day of April next. AND *it is further covenanted and agreed,* that the said [*vendor*], his heirs, executors, or administrators, shall, at his or their own expense, make out a good and clear title to the said manor, hereditaments, and premises, and also procure assignments of all such outstanding terms, or other incumbrances, as shall or may be subsisting upon the said manor, hereditaments, and premises: *And* in case an act of Parliament should be necessary for perfecting the said title, THEN that the said [*vendor*], his heirs or assigns, shall use his and their utmost endeavours to procure the same, and bear and pay the whole expense thereof: AND that he the said [*purchaser*], his heirs or assigns, shall pay the expense of the conveyance of the said manor, hereditaments, and premises, so to be made to him or them as aforesaid (*d*). IN WITNESS &c.

Purchaser to have possession, and receive rents from a certain day.

Lastly, seller to make out title at his own expense; and procure assignment of terms, and act of Parliament, if necessary.

Purchaser to pay for his conveyance.

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chaser to pay, or otherwise secure the same.

or shall well and truly pay, or cause to be paid, the said sum of £—— to the said [*vendor*], his heirs, executors, administrators, or assigns, or otherwise secure the same, to the approbation and satisfaction of the said [*vendor*], [or his said trustees]."]

(*d*) It may be added,

Trifling errors not to vacate contract.

"AND *further,* that any trifling error or omission respecting the quantity, or other description of the said premises, shall not vacate this agreement, but in such case an abatement shall be made out of the said purchase-money, or some other equivalent shall be given; and in case the said parties should disagree thereon, the same shall be referred to arbitration or arbitration and umpirage."

If it be the purchaser's object to acquire the whole of the estate, or a legal instead of a reputed manor, (for the distinction as to which see the note under APPOINTMENT OF GAMEKEEPER, *post,* Vol. 2), or to acquire a freehold estate;—or an estate situate in a particular place,—it may be proper to add,

Errors in description to avoid agreement.

"BUT NEVERTHELESS *it is hereby declared and agreed,* that if the said [*vendor*] should not be able to make a good title to the whole of the said premises, or the same should not contain —— acres; or in case the said manor should prove

19. FOR SALE IN FEE, PART OF THE MONEY SECURED BY MORTGAGE.

to be a manor by reputation only; or in case the said premises should prove not to be of a freehold tenure: or in case the said premises should prove not to be situate in the said parish of ——; Then the said [*purchaser*] shall be at liberty wholly to vacate this agreement."

20. AGREEMENT *for the Sale of a* COPYHOLD *of Inheritance.*

20. SALE OF COPYHOLD OF INHERITANCE.

THESE ARTICLES OF AGREEMENT made and entered into the —— day of ——, 18—; BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part; Parties.

WITNESS, that the said [*vendor*] hath contracted and agreed to sell to the said [*purchaser*] the inheritance in possession, according to the custom of the manor of ——, in the said county of ——, of and in ALL THOSE customary or copyhold pieces or parcels of land, situate in the said manor, and now in the occupation of ——, and containing in the whole by estimation —— acres, be the same more or less, AT or for the price or sum of £——; AND that the said [*vendor*] shall within the space of one month from the date hereof, at his own expense, cause and procure to be made and delivered to the said [*purchaser*], his agent or attorney, a full, complete, and perfect abstract, in the usual manner, of the title of him the said [*vendor*], thereto: AND that he the said [*vendor*] and all other persons having any estate therein, shall on or before the —— day of —— next, ensuing, in case the counsel of the said [*purchaser*] shall be of opinion that the said [*vendor*], has a good title to the inheritance in possession in fee-simple of the said premises, according to the custom of the said manor, duly surrender the same, according to the custom of the said manor, to the use of the said [*purchaser*], his heirs and assigns, or as he or they shall direct, to be holden at the will of the lord, according to the custom of the said manor, by the rents, heriots, and services therefore due and of right accustomed,

Vendor contracts to sell.

Parcels.

Price.

Vendor to make and deliver abstract.

To surrender.

20. SALE OF COPYHOLD OF INHERITANCE.

To execute covenants for title, &c.

Purchaser to pay consideration money on surrender being made and covenants for title, &c. executed,

Possession to be delivered on a certain day.

Vendor not to fell trees, &c.

Each party to pay his own counsel and solicitor.

Purchaser to pay for surrender and his own admission, and deed of covenants.

Liquidated damages.

but free from all other incumbrances whatsoever (*a*): AND that the said [*vendor*] and all other persons interested in the said premises, shall, on or before the said —— day of ——, execute the usual deed of covenants on the sale of copyhold estates of inheritance, for the title, for quiet enjoyment, and for further assurance (*b*); AND *it is hereby agreed*, that on such surrender being made and such deed of covenants being executed as aforesaid, the said [*purchaser*] shall pay to the said [*vendor*] the said sum of [*purchase-money*]: AND that the said [*vendor*] shall deliver the possession of all the said premises to the said [*purchaser*] on the said —— day of —— next: AND that the said [*vendor*] shall not in the mean time cut down any trees, or commit any other waste upon the said premises, or grant any new leases thereof, without the privity and consent of the said [*purchaser*]. AND *it is further agreed* that each of the said parties shall pay the fees and charges of his own counsel and solicitor, attending the examination of the said title; *And also* that the said [*purchaser*] shall pay the expenses of the said surrender, and all fees and fines upon the surrender to and admission of the said [*purchaser*] to the said premises, and that the said deed of covenants shall be prepared by and at the expense of the said [*purchaser*]; AND for the due performance of the several agreements herein contained, on their respective parts, each of them the said parties bindeth himself, his heirs, executors, and administrators, unto the other of them, his executors, administrators, and assigns, in the sum of £—— by way of liquidated damages for the non-performance of such agreements, and not by way of penalty.

Testimonium. IN WITNESS &c.

Husband's power over his widow's free-bench.

(*a*) The *free-bench* of a widow, in case her husband die before he perfects a surrender, would be defeated in equity by his agreement for sale; because where a husband can by his surrender bar his wife of her free-bench, any act done *for a valuable consideration* will be binding on her; and she is in that case compellable in equity to surrender her legal interest pursuant to such contract. *Hinton* v. *Hinton*, 2 Ves. sen. 631, 638; Ambl. 277: *Brown* v. *Raindle*, 3 Ves. 256. [The recent act relating to dower (3 & 4 Will. 4, c. 105) does not affect free-bench.]

Incumbrances.

(*b*) If the premises are subject to any incumbrances, *vide ante*, pp. 459, 461.

21. [AGREEMENT *for* PURCHASE *at an* AUCTION, *Indorsed on the Particulars of Sale* (*a*). 21. PURCHASE BY AUCTION.

MEMORANDUM that at the within-mentioned sale by auction [*purchaser*], of &c., was the highest bidder for, and purchaser of, lot —— of the within-printed particular, at the price of £——, subject to the within-printed conditions; *And* has paid unto the within-named [*auctioneer*] the sum of £—— by way of deposit and part payment; *And* shall pay to the vendor on the —— day of ——, the sum of £—— being the residue of the said purchase-money. As witness our hands this —— day of ——.

[*Auctioneer*] for the vendor.
[*Purchaser.*]

(*a*) [Sir *E. Sugden* advises that there should be two sets of conditions and two agreements, one to be signed by the purchaser and one by the auctioneer, of which he gives forms; (Vendors, Vol. 3, App. p. 5); but it seems to be better that there should be two copies of the same agreement, in order to preclude the possibility of any variance in the construction.]

22. [AGREEMENT *for the purchase of a* LOT *which had* NOT BEEN SOLD *at an* AUCTION, *subject to the* CONDITIONS *agreed upon at the Auction*; INDORSED *on the Conditions of Sale.* 22. PURCHASE OF LOT UNSOLD AT AN AUCTION.

MEMORANDUM that [*vendor*], of &c., has sold, and [*purchaser*], of &c., has purchased lot —— of the within-printed particular, at the price of £——, subject to all such of the within-printed conditions as are applicable to a sale by private contract; *And* that the said [*purchaser*] has paid the sum of £—— by way of deposit and part payment unto the within-mentioned [*auctioneer*] as the agent of the said [*vendor*], *And* shall pay the sum of £——, being the residue

22. PURCHASE OF LOT UNSOLD AT AN AUCTION.

of the said purchase-money unto the said [*vendor*], on the —— day of ——, as witness our hands this —— day of ——.

[*Vendor*] (*a*).
[*Purchaser.*]

As to auctioneer's selling privately.

(*a*) [The auctioneer would not be authorised, as such, to sell by private contract; and before the purchaser accepts his signature to such contract, he should ascertain that he has been duly authorised to make it, and, if the vendors are trustees, a similar inquiry should be made. See *Daniel* v. *Adams*, Ambl. 495, and *ante*, p. 322.]

23. TO GRANT WIFE ANNUITY FOR JOINING IN A CONVEYANCE OF COPYHOLDS, in WHICH SHE HAS AN ESTATE FOR LIFE.

23. AGREEMENT *to charge an* ANNUITY *upon* LANDS, *in consideration of Wife joining in a Sale of* COPYHOLD LANDS *settled on her for Life.*

AN AGREEMENT made the —— day of —— 18—, BETWEEN [*vendor*], of &c., and [——] his wife, of the one part; and [*trustee*], of &c., of the other part.

Parties.

Recital of settlement of copyhold on wife for life, in remainder.

WHEREAS the copyhold or customary lands of the said [*vendor*], situate and being at —— in the county of——, stand settled and assured unto or in trust for the said [*wife*] for her life, to take effect upon his decease. AND WHEREAS the said [*vendor*] is desirous of selling and disposing of the said copyhold or customary lands; *and* hath actually entered into a contract for the sale thereof to [*purchaser*], of &c., at or for the price or sum of —— pounds; *And* for the purpose of enabling the said [*vendor*] to complete the said contract, the said [*wife*] hath agreed to join with her said husband in the sale and conveyance of the same copyhold lands to the said [*purchaser*], upon condition that he the said [*vendor*] shall and do, in lieu thereof, settle and secure unto, upon, or in trust for her the said [*wife*], for her life, to commence from his decease, the yearly sum of £——, to be issuing out of his lands and real estates at ——, in the county of ——. NOW BE IT KNOWN, that the said [*vendor*] doth for himself, his heirs, executors,

Recital, that husband had contracted to sell settled estate, and that his wife had agreed to join in consideration of husband agreeing to settle an annuity on her out of other property.

Covenant to charge an es-

and administrators, covenant, promise, and agree, to and with the said [*trustee*], (a trustee nominated by and on behalf of the said [*wife*]), his executors and administrators, that if the said [*wife*] do and shall join in the sale and conveyance of the said copyhold or customary premises to the said [*purchaser*], then and in such case he the said [*vendor*] or his heirs, will or shall, at his and their own costs and charges in all things, within twenty days next after the making and executing such sale and conveyance, by such ways and means as the counsel of the said [*trustee*], his executors or administrators, shall advise, grant, limit, settle, and appoint, unto or in trust for the said [*wife*], an annuity or yearly sum of £——, free from all taxes, charges, and deductions whatsoever, to be charged and chargeable upon, and issuing and payable out of, all the lands and real estates of him the said [*vendor*], situate and being in —— aforesaid, to commence and be computed from the day of the death of the said [*vendor*], and to continue payable to her during the term of her natural life, in lieu and stead of her estate for life in the said copyhold or customary estate, and in compensation for the same. In witness &c.

23. To grant wife annuity for joining in a conveyance of copyholds, in which she has an estate for life.

tate with annuity for wife after husband's death, in case she joins in conveyance of copyholds.

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24. AGREEMENT *for the Purchase of a* Remainder *or* Reversion (*a*) *in Fee, expectant on an Estate for Life*

24. For purchase of reversion.

Articles of agreement made and entered into the —— day of ——, 18—; Between [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Parties.

THE said [*vendor*] doth hereby agree with the said [*purchaser*] to sell to him the remainder or reversion in fee of him the said [*vendor*], expectant upon, and to take effect in possession immediately after the determination of the estate for life of [*tenant for life*], of &c., of and in All those mes-

Vendor agrees to sell.

Parcels.

(*a*) [As to sales of reversionary interests, *post obit* securities, &c., *vide* title Bonds.]

24. FOR PURCHASE OF REVERSION.

suages or tenements and premises situate at ——, in the county of ——, and now in the occupation of ——, and containing &c., with their appurtenances, free from all incumbrances, at or for the price or sum of £——: *And* that he the said [*vendor*] shall, within one month from the date hereof, at his own expense, make and deliver to the said [*purchaser*], his agent or solicitor, an abstract of the title of him the said [*vendor*] to the said messuages or tenements and premises; *And also* that the said [*vendor*] or his heirs, and all other necessary parties, will and shall, on or before the —— day of —— next, on receiving from the said [*purchaser*], his executors or administrators, the said sum of £——, at the costs and charges of the said [*purchaser*], his heirs, executors, administrators, or assigns, execute a proper conveyance, for conveying and assuring the said remainder or reversion in fee, expectant upon the determination of the estate for life of the said [*tenant for life*], of and in all the said messuages or tenements and premises, with their appurtenances, unto the said [*purchaser*], his heirs and assigns, or otherwise as he or they shall direct, free from all incumbrances: AND THE SAID [*purchaser*] hereby agrees with the said [*vendor*], that he the said [*purchaser*], his heirs, executors, administrators, or assigns will or shall, on the execution of such conveyance as aforesaid, pay the said sum of £—— unto the said [*vendor*], his executors or administrators. AND *it is further agreed*, that the said conveyance shall be prepared by and at the expense of the said [*purchaser*]; *And* that the same shall be settled and approved, on the parts of the said [*vendor*] and [*purchaser*], by their respective counsel or solicitors: *And* that each of the said parties shall pay the fees of his own counsel, and the charges of his own solicitor: *And* that if the said conveyance and assurance should not be executed before the said —— day of ——, then this agreement shall be wholly void to all intents and purposes whatsoever, and the jurisdiction of equity wholly barred (*a*); it being the true intent and

To make and deliver abstract.

All necessary parties to execute conveyance.

Purchaser agrees to pay consideration money.

Conveyance to be at purchaser's expense; but to be settled by parties' respective counsel.

Each party to pay his own counsel and solicitor.

Time, the essence of the contract.

(*a*) A similar provision to the above should never be omitted, unless the agreement of the parties be otherwise; although in the absence of any express stipulation, if on an agreement for the sale of a reversionary estate, part of the terms is, that the purchase-money shall be paid by a certain time, and it be not so paid, by default of the purchaser, the vendor is discharged from his contract; because it is of the essence

Time, the essence of the contract in sales of reversionary interests.

meaning of the said parties, that in such event, execution of this agreement shall not be enforced by any Court of equity; and that the death of the said [*tenant for life*] before the said —— day of —— next, shall not in anywise affect this agreement (*b*). In witness &c.

24. FOR PURCHASE OF REVERSION.

of justice that such a contract should be executed immediately, and without any delay; as no man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay. *Newman* v. *Rogers*, 4 Bro. C. C. 393; 1 Price, 298. See *Hipwell* v. *Knight*, 1 You. & C. 416. So, specific performance was refused on the laches and trifling conduct of the plaintiff, the contract being for a sale to the plaintiff under a bankruptcy of a reversionary interest for life, which, in the interval, fell into possession; and the defendants having also been in some degree remiss, the bill was dismissed without costs upon delivering up the agreement. *Spurrier* v. *Hancock*, 4 Ves. 667. But if the purchaser of a reversion objects on account of a want of title, and continues treating after the time is elapsed when a good title was to be made and the purchase completed, and the title is afterwards made good, he will be held to a specific performance. *Britton* v. *Twining*, before Sir *J. Leach*, V. C., 30th June, 1818, 1 Madd. Ch. 417, 2nd Ed.

(*b*) Add clause for liquidated damages, if it be the agreement, *ut ante*, p. 542.

Liquidated damages.

25. AGREEMENT *for the* Purchase *of an Estate for the* Life *of the Vendor; or for the Life of another Person or Persons* (*a*).

25. FOR PURCHASE OF ESTATE FOR LIFE, OR POUR AUTRE VIE.

Articles of agreement made and entered into the —— day of ——, 18—, Between [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Parties.

(*a*) The having issue is not an essential preliminary to the power of alienation in the case of an estate *pour autre vie*, limited to one and the heirs of his body, as it is in the case of a conditional fee at common law, Hargr. n. Co. Litt. 19. a. (4); from which the mode of barring by alienation was evidently borrowed. Hargr. n. Co. Litt. 20. a. (5); 2 Gwill. Bac. Abr. 543. Estates *pour autre vie*, not being entailable within the statute *de donis conditionalibus*, 13 Ed. 1, c. 1, such persons as have interests in them in the nature of estates tail, may bar their issue and all

A *quasi* entail of an estate *pour autre vie* may be conveyed by an ordinary conveyance.

25. FOR PURCHASE OF ESTATE FOR LIFE, OR POUR AUTRE VIE.

FIRST, the said [*vendor*] doth hereby for himself, his heirs, executors, and administrators, agree to sell to the said [*purchaser*] the (*b*) life estate of him the said [*vendor*], in ALL

Agreement by vendor to sell premises.

remainders over, by *alienation* of the estate *pour autre vie*, in the same manner as those who are strictly speaking tenants in tail may do by an enrolled assurance; such as a conveyance by the *quasi* tenant in tail, by lease and release, or surrender to the immediate remainder-man or reversioner, although it be only to renew the lease, and although the surrender be made without the concurrence of the trustees of the legal estate, or even by articles of agreement, either to sell or settle the estate. *Low* v. *Burron*, 3 P. Wms. 262; 2 Eq. Ca. Abr. 394, pl. 1: *Baker* v. *Bayley*, 2 Vern. 225: *Norton* v. *Frecker*, 1 Atk. 524: *Wasteneys* v. *Chappel*, 1 Bro. Par. Cas. 457: *Forster* v. *Forster*, 2 Atk. 259: *Grey* v. *Mannock*, 2 Eden, 339, cited 6 T. R. 292: *Blake* v. *Blake*, 3 P. Wms. 10; 1 Cox, 266: *Moody* v. *Walters*, 16 Ves. 313: *Blake* v. *Luxton*, G. Coop. 178: *Mogg* v. *Mogg*, 1 Meriv. 690. But not by devise, according to the better opinion. *Saltern* v. *Saltern*, 2 Atk. 376: *Campbell* v. *Sandys*, 1 Sch. & Lef. 281: *Blake* v. *Luxton*, G. Coop. 185. The dictum in *Doe* d. *Blake* v. *Luxton*, 6 T. R. 293, *contra*, is now overruled by *Dillon* v. *Dillon*, 1 Ball & Beatty, 95. [In *Dillon* v. *Dillon*, the settlement was of lives renewable for ever, and the tenant *quasi* in tail on whose will the question arose, had died without issue, so that his estate was spent, and *on that ground* Lord *Manners* held that he could not bar the remainder-man by his will. The recent statute of wills, 7 Will. 4 & 1 Vict. c. 26, s. 3, extends the devising power over all real and personal estate which the testator shall be entitled to at the time of his death, and which would otherwise devolve upon his *heir at law or customary heir*, or upon his executor or administrator; and the clause further declares that the power thereby given shall extend to estates *pour autre vie*, whether there shall or shall not be any special occupant thereof. The clause in the Statute of Frauds, by which the question was formerly governed, does not mention special occupancy generally, but alludes to the "heir," and to "executors and administrators," as special occupants. But the language of the Courts has always treated the issue *quasi* in tail and the remainder-men as special occupants; (see *Saltern* v. *Saltern*, 2 Atk. 376); and the question upon the recent statute will be, whether the earlier part of the clause just cited controls the general meaning of the subsequent words relating to estates *pour autre vie*.]

Disposing power of *quasi* tenant in tail.

Stat. 7 Will. 4 & 1 Vict. c. 26, s. 3.

Wife's estate *pour autre vie.*

When a married woman has a freehold in an estate *pour autre vie*, either absolutely, or *quasi* in tail, a conveyance by herself and her husband, acknowledged by her under the authority of the recent act, is necessary. *Duke of Grafton* v. *Hanmer*, 3 P. Wms. 266, note; Perk. s. 613; Harg. n. Co. Litt. 121. a.; 2 Bl. Com. 355; 5 Cru. Dig. 200; Wms. n. 2, Saund. 175, f. (3); Gilb. Uses, 40, 244; Ritso's Introduction to the Science of the Law, 204; Noy's Maxims, 69, 9th Ed.

ESTATE FOR OTHER LIVES.

(*b*) If the estate be held for the lives of other persons, say,

"the estate of him the said [*vendor*], for the lives of [*nominees*], granted and demised by indenture, bearing date

25. FOR PURCHASE OF ESTATE FOR LIFE, OR POUR AUTRE VIE.

THAT messuage or tenement and premises, with the appurtenances, situate, &c., for the sum of £—— (*c*); *And also,* at his own costs, to make and deliver unto the said [*purchaser*], or his solicitor, a full, complete, and perfect abstract of the title to the freehold and inheritance of the said premises; *And* if the counsel of the said [*purchaser*] should be of opinion (*d*), that the said [*vendor*] has a good title to an estate for his life in the said premises, then that he the said [*vendor*] and all other necessary parties shall, on or before the —— day of —— now next, by good and sufficient conveyances and assurances in the law, and with the usual and other proper covenants for the title, for quiet enjoyment, and for further assurance, convey and assure unto the said [*purchaser*], his heirs and assigns, or as he or they shall direct, the said messuage or tenement and premises, for the (*e*) life of the said [*vendor*], free from all incumbrances (*f*); *And,* at the same time, deliver unto the said [*purchaser*] all the title deeds and writings in the possession or power of the said [*vendor*], relating to the said premises. AND THE SAID [*purchaser*] hereby agrees for himself, his heirs, executors, and administrators, that he the said [*purchaser*] shall and will, on the execution of the said conveyance, pay the sum of £—— unto the said [*vendor*] (*g*). AND *it is*

To make and deliver abstract.

If title good, to make conveyance.

with usual covenants.

And deliver title deeds.

Agreement by purchaser to pay consideration money.

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on or about the —— day of ——, 18—, and made between [*lessor*], of &c., of the one part, and the said [*vendor*], (or [*lessee*], of &c.), of the other part; and afterwards perfected by livery of seisin, of and in ALL THAT, &c."

Reference to freehold lease.

(*c*) If it be the agreement, instead of the succeeding clause, say,

LEASEHOLD.

"*But* the said [*vendor*] shall not be required to produce any further evidence of the title to the said premises, than the said lease from the said [*lessor*] to the said [*lessee*], (and a conveyance thereof from the said [*lessee*] to the said [*vendor*]);"

Vendor not to produce title to the inheritance.

(*d*) *Vide ante*, p. 457, n.

(*e*) "for the lives of the said [*nominees*], and the (survivors and) survivor of them,"

ESTATE POUR AUTRE VIE.

(*f*) If held by lease, say,

LEASEHOLD.

"*But* subject to the rent, covenants, conditions, and agreements, reserved and contained in the said indenture of lease;"

Subject to rent and covenants.

(*g*) *Add clause to pay the rent and perform the covenants*, ut post, 552.

25. FOR PURCHASE OF ESTATE FOR LIFE, OR POUR AUTRE VIE

hereby further agreed, that the said conveyance shall be prepared by and at the expense of the said [*purchaser*]; AND that the same conveyance shall be settled and approved on the parts of the said [*vendor*], and [*purchaser*], by their respective counsel or solicitors; AND that each of the said parties shall pay the fees of his own counsel, and the charges of his own solicitor; AND that all (*h*) rates, taxes, and outgoings, payable for or in respect of the said premises, to the —— day of ——, shall be paid by the said [*vendor*], from which time the said [*purchaser*] shall be let into possession of the said premises: *add clause, time to be the essence of the contract, ut ante*, p. 546. AND that the death of the said (*i*) [*vendor*] before the said —— day of —— next, shall not in anywise affect this agreement. IN WITNESS &c.

Conveyance to be at purchaser's expense.

And each party to pay his own counsel and solicitor.

Rates, &c. to be paid by vendor, till possession delivered to purchaser.

Death of vendor not to affect agreement.

LEASEHOLD FOR LIVES.

ESTATE FOR OTHER LIVES.

(*h*) "rent,"

(*i*) "[*nominees*], any or either of them, before &c."

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26. PURCHASE OF THE WHOLE, OR PART OF LEASEHOLD.

26. AGREEMENT *for the purchase of the* WHOLE, *or* PART *only, of a* LEASEHOLD *Estate; with or without the* LICENSE *of the Lessor.*

ARTICLES OF AGREEMENT made this —— day of ——, 18—: BETWEEN [*vendor*], of &c., for himself, his heirs, executors (*a*), and administrators, of the one part; and [*purchaser*], of &c., for himself, his heirs, executors, and administrators, of the other part.

Parties.

Vendor agrees to sell.

FIRST, the said [*vendor*], in consideration of the sum of £——, agrees to sell to the said [*purchaser*], ALL THAT

Premises.

messuage or tenement, garden, and premises, situate at ——, in the county of —— (*b*), for the remainder of a term of

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(*a*) The executors and administrators need not be named, *vide ante*, p. 434, (*b*).

PART ONLY.

(*b*) If part only of the premises are sold, add,

"being part of the premises held by the said [*vendor*],"

—— years (*c*) from the —— day of ——, 17—, granted by an indenture bearing date on or about the —— day of ——, 17—, and made between [*lessor*], of the one part, and [*lessee*], of the other part, SUBJECT to the (*d*) rent, covenants, and agreements therein reserved and contained, on the part of the lessee to be paid and performed: AND ALSO within one month from the date hereof, at his own costs, to procure and deliver unto the said [*purchaser*], an abstract of (*e*) the said indenture of lease, (and all subsequent deeds, evidences, and writings, relating thereto), but not of any previous deeds or writings whatever. AND ALSO on or before the —— day of —— next, on receiving the said purchase-money, with all other requisite and necessary parties, and

26. PURCHASE OF LEASEHOLD.

Reference to lease.

Vendor to deliver abstract;

to execute assignment;

(*c*) If the lease be for years determinable on lives, say,

DETERMINABLE ON LIVES.

"for the remainder of a term of (*ninety-nine*) years, if [*nominees*], of &c., any or either of them, should so long live, granted, &c."

(*d*) If part only of the premises are sold, say,

PART ONLY.

"apportioned rent of £——, and to the covenants and agreements therein reserved and contained, on the part of the lessee to be paid and performed, so far as the same relate to and concern the messuage or tenement, garden and premises, hereby agreed to be sold."

Subject to apportioned rent, and covenants for parts sold.

(*e*) If the agreement be that the vendor shall produce the lessor's title, say,

To produce lessor's title.

"of the title of the said [*lessor*], and also of the said indenture of lease, (and all subsequent deeds, evidences, and writings relating thereto);

And if the agreement be for the purchase of an underlease, say,

UNDERLEASE.

"of the title of the original and all subsequent lessors, and also of the said indenture of lease, (and all subsequent deeds, evidences, and writings, relating thereto)."

To produce original and subsequent lessor's title.

If the purchaser of a leasehold interest be not precluded by the contract, he should generally require the production of the lessor's title, [*ante*, p. 70]; and if it be an underlease, the title of the original and all under-lessors: in the latter case, *each* lease should be carefully inspected by the solicitor for the purchaser, to ascertain whether there are any covenants, the breach of which would cause the assignee to be evicted by a superior landlord, without any default on the assignee's part. Noy's Maxims, 157, 9th ed.

Purchaser should require production of lessor's title.

The observations *infra*, Vol. 4, p. 286, equally apply to the *purchase* of a leasehold interest.

26. PURCHASE OF LEASEHOLD.

such persons as shall be interested in the purchase-money (*f*), by a good and sufficient assignment, or other assurance, and with the usual and other proper covenants, to assign or otherwise assure the said messuage or tenement, garden, and premises, with the appurtenances, unto the said [*purchaser*], or as he shall appoint, for the residue of the said term, free from all incumbrances: AND ALSO to pay and discharge all rent, taxes, rates, assessments, and other outgoings for the said premises, up to the said —— day of—— next (*g*). AND THE SAID [*purchaser*] hereby agrees to pay the said purchase-money, upon or at the execution of the said conveyance: AND ALSO in the conveyance to him, if required, to covenant thenceforth to pay the (*h*) rent, and

To pay rent, &c., to a given day.

Purchaser agrees to pay consideration money; and to pay the rent and perform the covenants.

(*f*) If the consent of the lessor be necessary, say,

Vendor to procure license to assign

"and with the license and consent of the lessor, to be procured by and at the expense of the said [*vendor*], and"

PART ONLY.

(*g*) If part only of the premises are sold, say,

Vendor to covenant to pay rent and perform covenants for part retained, and indemnify purchaser therefrom.

"AND ALSO, in the assignment to the said [*purchaser*], to covenant thenceforth to pay the remainder of the said rent, and observe the covenants and agreements reserved and contained on the part of the lessee to be paid and performed, so far as the same relate to, and concern, the premises retained by the said vendor, and indemnify the said [*purchaser*] therefrom. AND *it is hereby agreed*, that, in the said assignment, there shall be contained cross powers of distress on the premises sold or retained, for the recovery of such part of the said apportioned rent as either of the said parties shall pay, in consequence of the default of the other of them, and also for the costs and expenses attending the same *: AND FURTHER, that the said [*vendor*] shall, at his own costs deliver unto the said [*purchaser*], true and attested copies of the said indenture of lease, (and all subsequent deeds, evidences, and writings, relating thereto): *And*, in the assignment to the said [*purchaser*], covenant in the usual manner to produce the same when required, and to deliver other copies thereof, from time to time, at the request, costs, and charges of the said [*purchaser*]."

Assignment to contain cross powers of distress.

Vendor to deliver attested copies of lease, &c.,

and to covenant for their production, and to let purchaser have other copies.

PART ONLY.

(*h*) If part only of the premises are sold, say,

To pay appor-

"said apportioned rent of £——, and observe the covenants

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* *Vide* Forms, *post*, Vol. 4, pp. 197, 202.

perform the covenants, reserved and contained in the said indenture of lease, and to indemnify the said [*vendor*] therefrom; which conveyance is to be prepared by and at the costs of the said [*purchaser*]: (*i*) AND ALSO, if required, to execute a counterpart of the said conveyance, or a deed of covenant, or a bond in a sufficient penalty, for payment and performance of the said rent and covenants respectively, the

26. PURCHASE OF LEASEHOLD.

Assignment to be at purchaser's expense.

Purchaser to execute counterpart, &c., at vendor's expense.

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and agreements reserved and contained on the part of the lessee to be paid and performed, so far as the same relate to, and concern the messuage or tenement, garden, and premises, hereby agreed to be sold, and indemnify," &c. *as above.*

tioned rent and perform covenants for parts sold.

(*i*) If the consent of the lessor be necessary, and if it be the agreement, say,

"AND ALSO after such assignment, if required by the lessor, to execute a defeazance reviving the condition contained in the said lease*; and thereby covenant with the lessor, to pay the rent, and perform the covenants reserved and contained in the same lease, for the residue of the said term, and which deed shall be prepared by the solicitor of the lessor, at the costs and charges of the said [*purchaser*]:"

Purchaser to execute defeazance, reviving condition.

See note (*f*) *ante*, p. 552.

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* If part only of the premises are sold, say,

PART ONLY.

"so far as concerns the messuage or tenement, garden, and premises hereby agreed to be sold; and thereby to covenant with the lessor, to pay the said apportioned rent of £——, and to perform the covenants reserved and contained in the same lease, for the residue of the said term, so far as relates to the premises hereby agreed to be sold, and which deed, &c." *as above.*

Purchaser to execute defeazance, reviving condition for the part sold.

But in such a case, it would perhaps be better for the vendor to take a new lease, for the residue of the term of the part retained, and for the purchaser also to take a new lease, for the residue of the term of the part sold, which would save the expense of the defeazance and shorten the assignment, and also prevent the necessity and inconvenience of cross powers of distress to the vendor and purchaser, for recovery of the apportioned rent, in case either of them should by the neglect of the other be distrained on, or otherwise obliged to pay it. [*Vide* Form, *post*, Vol. 2, p. 561, 2nd ed.; and *infra*, Vol. 4, p. 202.]

26. PURCHASE OF LEASEHOLD.

same counterpart, covenant, or bond, being prepared by, and at the costs of the said [*vendor*] (*k*). (*Add clauses, time to be the essence of the contract; and for liquidated damages, ut ante,* 456, 542). IN WITNESS &c.

Fixtures, &c. to be taken at a valuation.

(*k*) If the fixtures, or any articles of furniture, &c., are to be taken at a valuation, see Form, *ante*, p. 535.

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27. PURCHASE OF LEASEHOLD HOUSE, UTENSILS, AND GOOD-WILL.

27. AGREEMENT *for the Purchase of a* LEASEHOLD *House, and the* UTENSILS, *and* GOOD-WILL *of a Business.*

ARTICLES OF AGREEMENT indented, made, and agreed on, the —— day of ——, 18—, BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the other part.

Parties.

Recital that vendor carried on business.

WHEREAS the said [*vendor*] hath for some time carried on and exercised the trade or business of a ——, at ——, in the county of ——, at a workshop [*or* manufactory] there; and which workshop [*or* manufactory], with the appurtenances, the said [*vendor*] is entitled to, for the remainder of a term of —— years therein, granted to him by indenture of lease, bearing date on or about the —— day of ——, 18—, and made between [*lessor*], of &c., of the one part, and the said [*vendor*], of the other part.

Reference to lease.

Recital that vendor had made additions and improvements.

AND WHEREAS the said [*vendor*] hath made considerable repairs and improvements in the said workshop [*or* manufactory], and premises comprised in the said indenture of lease, and hath purchased divers implements, utensils, and fixtures, for the purpose of carrying on the said business of a ——.

Recital of contract to sell premises, utensils, fixtures, and good-will of business.

AND WHEREAS the said [*vendor*], being about to quit the said trade of a ——, the said [*purchaser*] hath contracted and agreed with him for the purchase of the said workshop [*or* manufactory], with the appurtenances, for the remainder of the said term of —— years, by the said indenture of lease granted; *And also* of

27. PURCHASE OF LEASEHOLD HOUSE, UTENSILS, AND GOOD-WILL.

the implements, utensils, and fixtures in (*a*) and upon the said premises, and used or employed in the said trade or business of ——, and of the good-will of the said [*vendor*] in the same business, on the terms and conditions following; that is to say, that he the said [*purchaser*] should, on the execution of the assignment and conveyance of the said workshop [*or* manufactory] and premises, with the said implements, utensils, and fixtures, secure to the said [*vendor*], his executors, administrators, or assigns, the sum of £——, payable at the end of three years from the date of these presents; with interest for the same, payable at the expiration of each year, after the rate of five pounds for each hundred pounds by the year: The said principal sum of £——, and the interest thereof, to be secured by the joint and several bond of the said [*purchaser*], and some other person as his surety, to be approved of by the said [*vendor*], in the penal sum of £——: *And also* by three several promissory notes, to be given by the said [*purchaser*] to the said [*vendor*], at the expiration of the first two years of the said term of three years, for the payment of the said sum of £——, by three several payments; as follows, that is to say, one of the said promissory notes to be for the payment of the sum of £——, and interest, at four months after the date thereof; one other of the same notes to be for the payment of the sum of £——, and interest, at eight months from the date thereof; and the other of the same notes to be for the payment of the like sum of £——, and interest, at twelve months from the date thereof; *And also* to pay the said [*vendor*], his executors, administrators, or assigns, interest for the said sum of £——, or so much thereof as should remain due, until the whole of the said sum of £—— should be paid off and discharged; *And* that the said [*purchaser*] should (*b*)

Terms of the contract.

(*a*) *or*, "particularly enumerated and described in the schedule hereunder written, or hereunto annexed."

Utensils, &c. specified in schedule.

(*b*) If it be the agreement, say,

"upon the execution or the said assignment give unto the said [*vendor*], three several promissory notes for the payment of the sum of £——, in manner and at the times following; that is to say, one of such notes for the payment of £——, at the end of one year from the date hereof; ano-

Variation where notes are to be given for good-will.

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secure to be paid to the said [*vendor*], his executors, administrators, or assigns, by the bond of him the said [*purchaser*] in a sufficient penalty, the yearly sum of £——, for and during the term of three years from the date of these presents, as a consideration for the good-will of the said business; the said sum of £—— to be paid to the said [*vendor*], his executors, administrators, or assigns, at the expiration of each year from the date hereof, but without any interest for the same. NOW THESE PRESENTS WITNESS, and the said [*vendor*], in consideration of the sums to be paid to him, his executors, administrators, or assigns, by the said [*purchaser*], as hereinafter is mentioned, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said [*purchaser*], his executors, administrators, and assigns, that he the said [*vendor*], his executors or administrators, will or shall, on or before the —— day of —— next, at the proper costs and charges in the law of the said [*purchaser*], his executors or administrators, well and effectually convey, assign, and assure, or cause or procure to be well and effectually conveyed, assigned, and assured by all proper and necessary parties, and with all proper, usual, and necessary covenants, unto the said [*purchaser*], his executors, administrators, and assigns; THE said workshop [*or* manufactory] at —— aforesaid, with the appurtenances thereunto belonging, for the residue then to come of the said term of —— years: *And also* all the implements, utensils, and fixtures (*c*) in or upon the said workshop [*or* manufactory], or used or employed in the said trade or business of a ——, or in anywise relating thereto; *And* the full, whole, and absolute estate, right, title, interest, term and terms of years which shall be then to come and unexpired, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, of him the said [*vendor*], of, in, to, or out of the same several premises, every or any part or parcel thereof: AND ALSO will and shall, from time

Agreement to convey.

Covenant by vendor to re-

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ther of such notes for the payment of £——, at the end of two years from the date hereof; and the other of such notes for the payment of £—— at the end of three years from the date hereof, as a consideration," &c. *as above.*

Utensils, &c. specified in schedule.

(*c*) *or*, "particularly enumerated and described in the schedule hereunder written, or hereunto annexed."

27. PURCHASE OF LEASEHOLD HOUSE, UTENSILS, AND GOOD-WILL.

to time, and at all times hereafter, recommend the said [*purchaser*], as a —— to all the late or present customers of him the said [*vendor*]; *And* use his and their utmost endeavours to procure them to deal with the said [*purchaser*]: AND that he the said [*vendor*] will not nor shall, at any time within the space of seven years hence next ensuing, directly or indirectly, alone or in partnership with any person or persons whomsoever, trade or deal in the said trade or business of a ——, in —— aforesaid, or within the space of —— miles thereof (*d*). AND THE SAID [*purchaser*] doth for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said [*vendor*], his executors and administrators, by these presents, in manner following; that is to say, that he the said [*purchaser*], his heirs, executors, or administrators, will or shall pay or cause to be paid unto the said [*vendor*], his executors, administrators, or assigns, during the said term of three years, to be computed from the time aforesaid, the clear yearly sum of £——, of lawful money of Great Britain, at the expiration of every year of the said term of three years, as a consideration for the good-will of the said premises as aforesaid: AND ALSO that he the said [*purchaser*], together with some other person to be approved of by the said [*vendor*], will and shall give and execute unto the said [*vendor*], a bond in the penalty of £——, for the payment unto the said [*vendor*], his executors, administrators, or assigns, of the sum of £—— at the expiration of three years, to be computed as aforesaid, together with interest for the same sum of £——, after the rate of five pounds for one hundred pounds by the year; such interest to be paid at the expiration of every year of the said term of three years: AND ALSO that he the said [*purchaser*], his executors or administrators, will or shall, at the expiration of two years, to be computed as aforesaid, make and deliver to the said [*purchaser*], his executors or administrators, three several promissory notes in writing, under the hand or hands of the said [*purchaser*], his executors or administrators, which promissory notes shall all of them bear date on the day of the expiration of the said two years, and to be made for securing the payment to the said [*vendor*], of the several sums, and at the several times following; that is to say, one of such promissory notes for

commend purchaser to his late customers; and for seven years not to carry on the business at ——, or within —— miles.

Covenant by purchaser to pay a sum for good-will of business, by three yearly instalments.

And to give bond, with surety, for payment of purchase-money at end of three years, with interest thereon yearly.

And at the end of two years give promissory notes for payment of purchase-money by three instalments.

(*d*) [As to restrictions on trading, see title BOND.]

27. PURCHASE OF LEASEHOLD HOUSE, UTENSILS, AND GOOD-WILL.

the payment of the sum of £——, and interest, at four months after the date thereof, one other of such promissory notes for the payment of the like sum of £——, and interest, at eight months after the date thereof; and the other of the said promissory notes for the payment of the like sum of £——, and interest, at twelve months after the date thereof; AND ALSO that he the said [*purchaser*], his executors or administrators, will or shall well and truly pay, or cause to be paid, unto the said [*vendor*], his executors, administrators, or assigns, interest for the said sum of [*purchase-money*], or on such part thereof as shall remain due and unpaid, after the rate of five pounds for each hundred pounds thereof, by the year, on the last day of each year of the said term of three years. AND *it is hereby further agreed*, that the said [*vendor*] shall remain in possession of the said premises, and be at liberty to use and enjoy the said utensils, implements, and fixtures, in the same manner as heretofore; *And also*, shall pay all rent, taxes, rates, assessments, and other outgoings, up to the said —— day of —— next; on which day the same shall be respectively delivered to the said [*purchaser*]. IN WITNESS &c.

Covenant to pay interest yearly.

Vendor to carry on trade, and pay rent, &c. till completion of contract.

Utensils, &c. specified in schedule.

THE SCHEDULE TO WHICH THE ABOVE (*or* WITHIN) WRITTEN AGREEMENT REFERS.

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28. PURCHASE OF ADVOWSON, OR GREAT OR SMALL TITHES.

28. AGREEMENT *for the Purchase of the Right of Patronage of an* ADVOWSON (*a*), *in Fee, for Life, or for Years.*

ARTICLES OF AGREEMENT made and entered into the —— day of ——, 18—, BETWEEN [*vendor*], of

Parties.

(*a*) [Originally all advowsons in the hands of lay patrons appear to have been donative, the patron conferring the church and all the temporalities annexed, by investiture, without the necessity of any institution by the bishop. The clerk was not *presented* to the bishop, but was at once invested with the temporalities by the patron. After the church became vacant, and until the patron chose to fill it, he took the profits of the benefice to his own use, and on his death they went to his

Distinction between donative and presentative advowsons.

&c., of the one part; and (*b*) [*purchaser*], of &c., of the other part. 28. PURCHASE OF ADVOWSON.

(*b*) *Vide post*, p. 566, n. (*a*).

heir, there being no direct means of compelling him to fill the vacancy, but only ecclesiastical censures. See *Fairchild* v. *Gaire*, Yelv. 61: *Britton* v. *Ward*, 2 Roll. Rep. 97: Mallory, *Quare impedit*, 35. After a long struggle, the church succeeded, (about the beginning of the thirteenth century), in establishing almost universally throughout England the course of filling parochial churches by presentation to the bishop, when the practice of investiture by the lay patron was consequently discontinued. Selden, Hist. Tithes, c. 12, s. 5. At the same time the doctrine of lapse was introduced, which entitled the ordinary to collate a clerk to the benefice, if the patron neglected to present one within six months from the happening of the vacancy. But some donatives survived the introduction of presentation and institution, or were so created by the Crown, or were so established by their founders*; and to these the law of lapse did not apply, but the patron still enjoyed the profits during a vacancy, and might at any time take back the benefice by resignation from the incumbent. See the learned judgment of *Littledale*, J., in *Rennell* v. *Bishop of Lincoln*, 9 Dowl. & Ry. 810; 7 B. & Cr. 113. Lord *Coke's* account of the matter is, that a church parochial may be donative and exempt from all ordinary jurisdiction, and the incumbent may resign to the patron, and not to the ordinary, neither can the ordinary visit, but the patron, by commissioners to be appointed by him. And so it is of a prebend, charity, chapel donative and the like, and no lapse shall incur to the ordinary except it be so specially provided in the foundation. But if the patron do once present to the ordinary, and his clerk is admitted and instituted, it becomes presentable, and shall never be donative after, and then lapse shall incur to the ordinary. *Fairchild* v. *Gaire*†. "At first," adds Lord *Coke*, "all the bishoprics in England were donative, and King Henry the First, being requested by the Bishop of Rome to make them elective, refused it; but King John, by his charter, granted that the bishoprics should be eligible. If the king found a church hospital of free chapel donative, he may exempt the same from ordinary jurisdiction, and then his chancellor shall visit the same. So he may by his charter license any subject to found such a church or chapel, and to ordain that it shall be donative and not presentable, and to be visited by the founder and not by the ordinary. And thus began donatives in England, whereof common persons were patrons." Co.

Lapse.

Extinguishment of donative.

* [If the founder ordain that he and his heirs shall present, then the ordinary shall have nothing to do with it. Year Book, 6 Hen. 7, c. 14. Free chapels donative are of this nature. See Brook Ab. *Presentment al Esglise.*]

† But only, it seems, when the donative is by prescription. For when it was by letters patent, it was held that several presentations had not destroyed the right of donation. *Ladd* v. *Widows*, Holt, 259; 2 Salk. 541, 3rd ed. 140.

28. PURCHASE OF ADVOWSON.

Agreement to sell.

FIRST, the said [*vendor*], for himself, his heirs, executors, and administrators, hereby agrees to sell to the said [*pur-*

Litt. 344, a. See *Shirt* v. *Carr*, 2 Br. P. C. 173: *Dixon* v. *Metcalf*, 2 Eden, 360; *S. C.*, *nom. Dixon* v. *Kershaw*, Ambl. 528; and stats. 1 & 2 Will. 4, c. 45, and 3 & 4 Vict. c. 60.]

Advowsons collative.

[Besides the distinction of advowsons into presentative and donative, there is a third division dependant, not on the nature of the advowson itself, but on the situation of the owner, which is that of advowsons *collative*. When the advowson or the right of appointment for the time is in a bishop, as he cannot present to himself, he combines all in one act of collating or conferring the benefice. 2 Blackst. Com. 22.]

Advowsons appendant and in gross.

[An advowson is *appendant* when it is annexed to a manor, *in gross* when it is severed from it; and if it be granted away for a partial estate, it becomes again appendant on the failure of that estate. *Finch's case*, 6 Rep. 646: *Hartox* v. *Cock*, Hutt. 89; Dyer, 259; Wats. Cl. Comp., *Incumb.* 69: *Bishop of Meath* v. *Marquis of Winchester*, 3 Scott, 561. But an advowson may be appendant to land merely, as well as to a manor; as, where the lord of a manor conveys land, parcel of a manor, with the advowson, the advowson will then be appendant to the land. An advowson appendant passes as an appurtenance, with that to which it belongs, although not named. *Infra*, Vol. 4, p. 315. See *Earl of Albemarle* v. *Rogers*, 2 Ves. jun. 477. But, upon a grant from the crown of a manor, with the appurtenances, an advowson will not pass, unless named. Stat. *de prærogativâ regis*, 17 Edw. 2, stat. 1, c. 15; Bac. Ab. *prærog.* (F. 2.); Hargr. Co. Litt. 121, b. n. 2: *Whistler's case*, 10 Rep. 64: *Willion* v. *Berkley*, 1 Plowd. 243: *Chancellor of Cambridge* v. *Walgrave*, 1 Hob. 127: *Attorney-Gen.* v. *Sitwell*, 1 You. & C. 559. If the owner of a manor, with an advowson appendant, is disseised, he shall present to the church, though it falls vacant during the disseisin. Fitzh. N. B. 33, Q.]

Grant from the Crown will not pass on advowson appendant, unless named.

Disseisin.

Advowson of a vicarage appendant.

[Upon the appropriation of rectories by ecclesiastical corporations, and the endowment of vicarages, the advowson of the vicarage became appendant to the rectory, subject, of course, to future separation. *Anon.* Dyer, 350, b.: *Shirley* v. *Underhill*, Moor, 894; Hob. 327.]

Perpetual curacies.

[As to perpetual curacies, see 1 H. Bl. 425; 3 Taunt. 643: *Faulkner* v. *Elzer* or *Elger*, 6 D. & Ry. 517; 4 B. & Cr. 449: *Farnworth* v. *Bishop of Chester*, 7 Dowl. & Ry. 96; 4 B. & Cr. 555: *Edenborough* v. *Archbishop of Canterbury*, 2 Russ. 93: *Doe* d. *Richardson* v. *Thomas*, 1 Per. & Dav. 578; 9 Ad. & El. 556.]

Alienation of advowsons by spiritual patrons.

[An ecclesiastical patron of a presentative or collative living may grant his patronage; and his grant is good for his own time. See 7 Bligh, 282, 288; but it must be expressly described, and did not, it was said, pass under a demise, by a prebendary, by the words, "commodities, emoluments, profits, and advantages to the prebend belonging;" because those words implied things gainful, which is contrary to the nature of an advowson. *London* v. *Collegiate Church of Southwell*, Hob. 303.]

Creditor's remedy against advowsons.

[An advowson is not extendible; but, under the stat. 1 & 2 Vict. c. 110, s. 12, may be sold in equity by a judgment creditor. *Vide infra*, Vol. 5, p. 38.]

chaser], ALL THAT the advowson, donation, right of patronage and presentation of, in, and to the rectory or parish, and parish church of ——, in the county of ——, and of the fee-simple and inheritance thereof (*c*), free from all incumbrances, at or for the price or sum of £——: AND ALSO to deliver unto the said [*purchaser*], within —— months from the date hereof, a full, complete, and perfect abstract of the title of the said [*vendor*] to the said advowson: AND if the counsel of the said [*purchaser*] should be of opinion that the said [*vendor*] has a good title thereto, then that he the said [*vendor*], and all other necessary parties (*d*), and persons interested in the purchase-money, shall on or before the —— day of —— now next, by good and sufficient conveyances and assurances in the law, and with the usual and other proper covenants for the title, for quiet enjoyment, and for further assurance, convey and assure the said advowson, with the appurtenances, unto, and to the use of, the said [*purchaser*] (*e*), his heirs and assigns, or as he or they shall direct,

28. PURCHASE OF ADVOWSON.

Parcels.

ADVOWSON.

To deliver abstract.

To execute conveyance.

(*c*) If for life, say,

FOR LIFE.

"for the natural life of the said [*purchaser*], (*or* [*nominee*], of &c.),"

If for lives, say,

FOR LIVES.

"for the natural lives of [*nominees*], of &c., and the natural lives and life of the survivors and survivor of them,"

If for years, say,

FOR YEARS.

"for the term of —— years from the date hereof,"

If for years determinable on lives, say,

FOR YEARS DETERMINABLE ON LIVES.

"for the term of —— years from the date hereof, if the said [*purchaser*] (*or* [*nominee*], of &c.), should so long live,"

(*d*) A husband is tenant by the curtesy of an advowson, though the church was not void during the marriage; Co. Litt. 29, a; Perk. s. 468; and a woman is dowable of an advowson in gross or appendant. Cro. Jac. 621; *post*, 564.

Dower and curtesy of an advowson.

(*e*) "for his life (*or* unto the said [*purchaser*], his heirs and assigns, for the natural life of the said [*nominee*],) (*or* for the natural lives of the said [*nominees*], and the natural lives and life of the survivors or survivor of them), (*or* unto the said [*purchaser*], his executors, administrators, and assigns, for the said term of —— years, determinable as aforesaid),"

FOR LIFE OR LIVES.

FOR YEARS.

28. PURCHASE OF ADVOWSON.

Agreement to pay purchase-money.

Purchaser to pay for conveyance;

but in other respects each party to pay his own counsel, &c.

In case of incumbent's death before conveyance, purchaser to nominate next incumbent.

free from all incumbrances (*f*). AND THE SAID [*purchaser*], for himself, his heirs, executors, and administrators, hereby agrees to pay the said sum of £—— unto the said [*vendor*], upon the execution of the said conveyance. AND *it is further agreed*, that the conveyance to the said [*purchaser*] shall be prepared by him at his own costs and charges; but that in all other respects, each of the said parties shall pay the fees of his own counsel, and the charges of his own solicitor: AND that in case of the decease, cession, deprivation, or relinquishment of the present incumbent of the said advowson, before the said —— day of ——, the said [*vendor*] shall duly present such person to the said advowson, as the said [*purchaser*] shall nominate: AND (*g*) that if the presentation to

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FOR LIFE OR YEARS.

To deliver attested copies of title-deeds, and covenant to produce originals.

(*f*) If for life or years, say,

"AND ALSO shall, at the execution of the said conveyance, at his own charges, deliver unto the said [*purchaser*] true and attested copies of all deeds, evidences, and writings, concerning the said advowson; *And* in the said conveyance enter into the usual covenant for the production of the originals, and to permit the said [*purchaser*] to have any fresh copies thereof respectively from time to time, at his own expense:"

Deeds relate to property of greater value.

Or if the purchase be in fee, and the deeds relate to other property of greater value than the advowson, the above form, or the form, *ante*, p. 460, n., may be used.

Right of presentation on promotion of clergymen to bishoprics.

(*g*) Upon the promotion of any spiritual person to a bishopric, whether in England or in the Isle of Man, all the benefices or dignities, except donatives, which he was possessed of before such promotion, are void upon his consecration, and upon his confirmation in case of translation; and the King is entitled for that turn to present to them in right of his royal prerogative, although the advowson belongs to a common person. 2 Blackst. Com. 383; Wood's Inst. 37, 10th ed.; 3 Com. Dig. 198, *Esglise*, (H 6); 2 Burn's Eccl. Law, 3, 6th ed. [But the right must be exercised in the lifetime of the person promoted. *Archbishop of Armagh* v. *Attorney-General*, 2 Br. P. C. 514.]

Bishop may prevent avoidance by retainer: *commendam retinere.*

But the bishop may prevent the avoidance by dispensation of *retainer* of such benefices which he had, if obtained before his consecration, or confirmation of his election; which is commonly called a *commendam retinere*, and is usually granted by the Archbishop of Canterbury, according to the statute 25 Hen. 8, c. 21, upon the King's mandate expressing his consent to it as the true patron of the benefice for that turn; and it seems that by a *commendam* for life, and for the time of continuing in the bishopric, the turn of the crown is answered, and in such a case the proper patron shall present upon the death or translation; but that the right of the Crown shall not be defeated by a *com-*

the said advowson should devolve on the Crown, in consequence of the present or any succeeding incumbent being

28. PURCHASE OF ADVOWSON.

If incumbent be made a bishop,

mendam granted for a term of months or years certain and limited. Gibson's Codex, 763, 913, 914, 915, 2nd ed. And see the great case of *commendam*, *Colt & Glover* v. *The Bishop of Coventry and Lichfield*, Hob. 140.

Commendam retinere for life, the patron shall present next.

This, however, appears to have been an usurpation of the Crown, and anciently the law was taken to be, that the rightful patron ought to present; and, as Levinz says, there is little or no reason that the king should present, because he has promoted the parson; for the church is the patron's church, and it is reasonable he should have the presentation of a parson thereto, (under whom he and his tenants and servants are to live), whose manners, doctrine, religion, and conversation, ought to be such as he shall approve, and, by the same reason, if the king promote my chaplain, of my family, or my bailiff, or other servant, he may impose another upon me. That anciently the king had no such prerogative is clear;—1. Because no mention is made of any such prerogative either in the king, or the pope, as certainly there would have been, if any such thing had then been;—2. There is no mention of it in the stat. *de prærogativâ Regis*, 17 Edw. 2, st. 1, which for the most part is but a sum or collection of certain prerogatives that were known law long before; 5 Bac. Abr. 489, nor in Stamford's treatise upon that statute, (see particularly cap. 8);—3. And the 5 Edw. 2, 148, in the book published by Serjt. Maynard, it appears that *Hugh de Courtney* brought a *Quare impedit*, and counts, that the Countess of Albemarle was seised, and presented a clerk, who was made a bishop, and so derives a title to the plaintiff to present; but there is no mention of the king's prerogative, or any presentment by him upon the parson's promotion to the bishopric;—4. Nor is any such thing mentioned in any of our ancient books, as Glanville, Bracton, Britton, Fleta, Doctor and Student, (see particularly Dial. 2, c. 36, 37, p. 218, 220, 18th ed.) &c.; and it has been denied to be law, as in Dyer, 228, b; 3 Lev. 378.

But it seems the Crown had not this prerogative anciently.

But the king's prerogative in such cases has been favoured since, and the law has now been settled, however repugnant to reason, as Dr. Watson says, (Clergyman's Law, 74, 4th ed. cap. 9), that [the king shall present upon such an avoidance. *Wright's case*, Moor, 399: *Edes* v. *Waller*, Vaughan, 19: *Rex* v. *Episcop. Londin. and Dr. Lancaster*, 3 Lev. 377; 1 Ld. Raym. 23; Holt. 586; Salk. 540; 4 Mod. 206; 1 Show. 441. Mr. Justice *Dolben* said, however, it had been always grumbled at; that it never came in question, but some Judge or other was against it; it having been so common in great livings, that the true patron in St. Andrew's, Holborn, had not presented above once in a hundred years, when he presented Dr. Stillingfleet; and he added, the church would suffer by it, because there was no one who had a great living but would present a blockhead, who was not likely to be made a bishop, in order to preserve his presentation. 1 Show. 461, 462, 463.

The King's prerogative right to present is now clearly established.

The king has this prerogative whether the church be new or old; and it extends as well to the second, third, and all other successive

The King has this preroga-

28. PURCHASE OF ADVOWSON.

contract not to be affected.

promoted to a bishopric [either] before [or after] the said —— day of ——, this contract shall not be affected thereby,

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tive, although the advowson be newly created, and he has it *toties quoties*.

promotions to bishoprics from the same benefice or dignity. Gibson's Codex, 763, 2nd ed. Thus, by the 1 Jac. 2, it was enacted, that St. James in the Fields should be divided from the parish of St. Martin, and a church erected there; and that it should be a parish of itself; and it was determined in *The King* v. *Bishop of London and Birch*, 3 Lev. 382; 2 Salk. 540; 4 Mod. 200; 1 Show. 164, *S. C.*, on the promotion of the rector of the parish of St. James to a bishopric, that the king has the same prerogative in churches newly erected, as in the old, to present, on promoting the parson to a bishopric; and in the above case of *The King* v. *Bishop of London and Dr. Lancaster*, 3 Lev. 377, the Crown presented thrice successively to the living of St. Martin in the Fields; and so, where the rector of Bow Church, &c., united into one parish by the 22 Car. 2, c. 11, s. 63, was created Bishop of Rochester, King George I. by his prerogative, in 1720, presented Dr. Lisle, who being afterwards created Bishop of St. Asaph, King George II., in 1744, presented Dr. Newton in like manner. *Grocers' Company* v. *Archbishop of Canterbury*, 3 Wils. 216; 2 W. Black. 770, Elsley's ed. *S. C.*

Quære, whether this doctrine extends to Ireland.

But it is said that, by a law in Ireland, no person can accept a bishopric there, until he has resigned all the preferments which he has in England: which preferments being void before the acceptance of the bishopric, it seems that the king in such case shall lose the presentation; 1 Burn's Eccl. Law, 142, 6th ed. The stat. 7 Edw. 4, c. 2; 1 Vol. Irish Statutes, 32, that none shall purchase benefices *in commendam* from Rome, does not extend to this. And see *Evans & Kiffin* v. *Ascuith*, Noy, 93; the notes to Dyer, 228, b; 3 Wils. 232; and Wood's Inst. 37, *contra*.

The right of the Crown postpones, but does not defeat the right of the person having the next presentation.

This right of the crown to present upon promotion, postpones the right of any grantee who has the next avoidance; as in the case put in Co. Litt. 379, a, that if a man seised of an advowson in fee, whether in gross or appendant, take a wife, by act in law the wife is entitled to the third presentation, if the husband die before: F. N. B. 148, C.; 150, G.; Perk. s. 342, 343; Co. Litt. 32, a: and if the husband grant the third presentation to another, and the husband die before the church becomes void, the heir shall present twice, and the wife shall have the third presentation, and the grantee the fourth; for, in this case, it shall be taken to be the third presentation, which he might lawfully grant. Thus, in the *Grocers' Company* v. *Archbishop of Canterbury*, in which three patrons had a right to present by turns, it was decided by the whole Court, that the prerogative presentations cannot be considered as *turns*, or deprive a patron of his turn; for a prerogative presentation upon the promotion of an incumbent to a bishopric is by act of law, which cannot operate to the injury of a third person; for *constructio et actus legis nulli facit injuriam*. Co. Litt. 148, 183, a, b; 2 Inst. 287; Dyer, 35, b. In fact this is the fifth vacancy; but, with respect to the patrons, it is but the third opening or avoidance, wherein the presentation of a patron, having the third turn, could take place. 3 Wils. 232;

nor shall the said [*purchaser*] be entitled to any deduction out of the said purchase-money. (*Add clauses declaring that* 28. PURCHASE OF ADVOWSON.

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2 W. Blacks. 773; *Vide* Perk. s. 331, 332; Hal. MS. n.; Co. Litt. 32, b; [stat. 3 & 4 Will. 4, c. 27, s. 31, *ante*, p. 20.]

A grant of the next presentation means that which the grantor is next entitled to.

So the grant of the next presentation to a benefice was decided to mean the next which the grantor would by law be entitled to make; and that, therefore, if the present incumbent be made a bishop, a covenant for title in the grant is not broken, and the grantee may present on the next vacancy. *Cailland* v. *Troward*, 2 H. Blacks. 324; *Trowland* v. *Cailland*, in error, 6 T. R. 439; aff. D. P., *Id.* 778; 8 Br. P. C. 71: *Grocers' Company* v. *Archbishop of Canterbury*, 2 W. Bl. 770; 3 Wils. 214.

Next presentation cannot be granted after church is vacant.

The grant of the next presentation, or of an advowson, made after the church is actually vacant, is a void grant *quoad* the fallen vacancy. [*Brooksby's case*, Cro. El. 174; *Baker* v. *Rogers*, *Id.* 788; and the possession of a clerk who has been wrongly presented is a vacancy, *Walker* v. *Hammersley*, Skinn. 907, 2 Vent. 32; 3 Sec. 115.] But it is good as to the advowson itself. *Wolferstan* v. *Bishop of Lincoln*, 2 Wils. 174; 3 Burr. 1504; 1 Wm. Blacks. 490; 2 *Id.* 1054, and Serj. Hill's MS. notes, Elsley's edit. [J. And, even if the contract be simoniacal, the conveyance of the advowson made in pursuance of such contract is void only as to the next presentation. *Greenwood* v. *Bishop of London*, 1 Marsh. 292; 5 Taunt. 724.J.] [It is said in some of the books that there is a difficulty in enforcing the right to present in case of a conveyance of the advowson during the vacancy, for that neither the grantor nor the grantee can bring a *quare impedit*, *Leak* v. *Bishop of Coventry*, Cr. El. 811; but this is a mistake, see *Rennel* v. *Bishop of Lincoln*, 7 B. & Cr. 113.]

Purchase o advowson, incumbent being *in extremis*, clerk not being privy, next presentation good.

Where a person having notice that the incumbent of a rectory was on his death-bed, and that it was uncertain whether he would live over the night, purchased the advowson; the incumbent died the next day; whereupon the purchaser presented his clerk, who was not privy to the contract: and the Court was of opinion, that the presentation was not void, it not appearing to have been made upon a simoniacal contract. *Barrett* v. *Glubb*, 2 Wm. Blacks. 1052; [*S. C.* Bac. Abr. title "Simony," (A); but see 1 Marsh. 311. The Court of King's Bench, in *Fox* v. *Bishop of Chester*, 2 B. & Cr. 635; 4 Dowl. & Ryl. 93, where the owner of an advowson contracted for the sale of the next presentation, when the incumbent was expected to be at the point of death, (he died the same afternoon), held, that the contract was simoniacal, and the presentation made by the purchaser void, though the contract was not made with a view to present any particular person, and the person afterwards presented was not privy to the transaction. *Abbott*, C. J., observed, in regard to *Barrett* v. *Glubb*, that though it contained the opinion of many very learned judges in favour of the validity of a sale of the next turn, made when the death of the incumbent was expected to take place, yet that it had not the full weight of a judicial decision, as the Lord Chancellor only decreed a conveyance of the advowson, and did not order the vendor, who remained the legal owner of the advow-

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time shall be the essence of the contract, and providing for liquidated damages on breach of contract, ut ante, pp. 456, 546, 542). IN WITNESS &c.

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son to present the purchaser's nominee. The case of *Barrett* v. *Glubb* was, however, fully confirmed by the House of Lords, reversing the decision of the Court of King's Bench, *Fox* v. *Bishop of Chester*, 3 Bligh, N. S. 123; 1 Dow. & Cl. 416.]

29. PURCHASE OF NEXT PRESENTATION TO PARSONAGE.

29. AGREEMENT *for the Purchase of the* NEXT PRESENTATION *to a Parsonage.*

ARTICLES OF AGREEMENT made this —— day of ——, 18—; BETWEEN [*vendor*], of &c., for himself, his heirs, executors, and administrators, of the one part; and [*purchaser*] (*a*), of &c., for himself, his heirs, executors, and administrators, of the other part.

Parties.

Roman Catholics cannot present to benefices;

and grants by them must be to Protestant purchaser.

(*a*) By the 12 Ann. stat. 2, c. 14, s. 1, Roman Catholics are disabled from presenting to any benefice; and every such presentation is declared void to all intents and purposes. By the stat. 11 Geo. 2, c. 17, s. 5, every grant made of any advowson, or right of presentation, collation, nomination, or donation to any benefice, by any person professing the Roman Catholic religion, or by any mortgagee, or trustee of such person, shall be null and void; unless it be for valuable consideration to a Protestant purchaser, 3 Cru. Dig. 26, 2nd ed. [Ante, p. 155]. The act of 10 Geo. 4, c. 16, has not removed the disabilities of Papists in respect of ecclesiastical and charitable patronage, s. 16. The restriction is often evaded, for when a Papist is possessed of an advowson, he generally conveys the next presentation to some Protestant friend, in trust to present such person as the Protestant shall think fit. When the living becomes vacant the Protestant presents the Papist's nominee.

Papist joint owner with Protestant.

The right of presentation given by the stat. of 12 Ann. st. 2, c. 14, to the Universities, does not arise where a Papist is jointly seised of an advowson with a Protestant, but the whole right resides in the latter, *Edwards* v. *Bishop of Exeter*, 7 Scott, 652. A Jew may present to a living. See 7 Bligh, 322. An infant may nominate and present to a a benefice—for his guardian takes nothing but that for which he can account, and a presentation after a vacancy has no pecuniary value. Co. Litt. 17, b.; *Bishop of London* v. *Wolferstan*, 3 Burr. 1514, 1 W. Bl. 440; *Arthington* v. *Coverley*, 2 Eq. Ab. 518; 1 Fonbl. Eq. 84, n. *Vide infra*, Vol. 5, p. 212. An avoidance before a sale by the assignees of a bankrupt patron belongs to the bankrupt. Watson, 106; 6 Geo. 4, c. 16, s. 77; 7 Scott, 667. An outlaw's right of presentation, as already

THE SAID [*vendor*] agrees to sell to the said [*purchaser*], for the sum of £——, the first and next donation, nomina- 29. PURCHASE OF NEXT PRESENTATION TO PARSONAGE.

Agreement to sell.

mentioned, belongs to the Crown, and so does that of an alien, Wats. 106.]

[As to the right of presentation among tenants in common, joint-tenants, and coparceners, see Co. Litt. 186, b; *Seymour* v. *Bennett*, 2 Atk. 483; *Barker* v. *Lomax*, Willes, 659; *Gully* v. *Bishop of Exeter*, 10 B. & Cr. 584; *Buller* v. *Bishop of Exeter*, 1 Ves. sen. 340; *Edwards* v. *Bishop of Exeter*, 7 Scott, 652; *Richards* v. *Earl of Macclesfield*, 7 Sim. 257.]

Clergymen not to purchase the next presentation, and be presented thereupon.

The stat. 12 Ann. c. 12, s. 2, after reciting "Whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged," enacts, "That if any person, from and after the twenty-ninth day of September, 1814, shall or do, for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance, of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept, the next avoidance of, or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, *and shall be presented or collated thereupon*, that then every such presentation or collation, and every admission, institution, investiture and induction upon the same, shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and that it shall and may be lawful to and for the Queen's majesty, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or accepting any such benefice, dignity, prebend, or living, shall thereupon, and from thenceforth, be adjudged a disabled person in law to have and enjoy the same benefice, dignity, prebend, or living ecclesiastical, and shall also be subject to any punishment, pain, or penalty, limited, prescribed or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical, had become vacant; any law or statute to the contrary in any wise, notwithstanding."

In the late Serjeant *Hill's* copy of Sir *Wm. Blackstone's* Reports, under *Barrett* v. *Glubb*, 1053, he says, from the title of the act, the general opinion has been, as mentioned by Ch. J. *de Grey* in this case, that the statute hath disabled every clergyman from purchasing the next presentation of any church preferment: but it is observable, that the purview of the act does not extend to a purchase by a clergyman, unless he or some other for whom he purchased it, be presented or collated thereupon; and on the other hand, though the purchaser was a layman, yet if he afterwards took orders, and was presented or collated to the living, &c., the next presentation of which he had purchased, the case would be within the purview.

But clergymen may purchase

But it appears by the following opinion of the learned Mr. *Fearne*, that the purchase of an advowson in *fee* by a clergyman, and a presen-

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tion, presentation, and free disposition (*b*) of and to the rectory and parish church of —— in the county of ——, which shall or may happen, accrue, or arise, upon or in consequence of the vacancy or avoidance of such rectory or living, by death, cession, deprivation, or relinquishment, or by whatsoever other ways or means the said church shall first or next happen to be void: AND ALSO to deliver unto the said [*purchaser*], within —— months after the date hereof, an abstract in the usual manner of the title (*c*) of the said [*vendor*], to grant the next presentation of and to the said rectory and parish church: AND ALSO on receiving the said sum of £——, to execute a grant, or other assurance, of the

To deliver abstract.

To execute conveyance, at purchaser's expense.

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the advowson, and be presented on the next avoidance.

tation of himself upon the death of the incumbent, is not within the statute: "I cannot say I see any thing to impeach the legality of the purchase by A. B. of the perpetuity of the advowson, or his being presented on the next avoidance, by a trustee of his own, to whom he shall have conveyed the advowson previous to such avoidance. The 12th Ann. stat. 2, c. 12, prohibits a clergyman's purchasing the next avoidance, or presentation to any benefice for himself; but I do not apprehend that statute at all affects the case of a purchase of the perpetuity of the advowson, or affects the right of presentation in that case; and, consequently, it appears to me, that if A. B., by deed, grants the advowson to, and to the use of some person and his heirs, who, by another deed of even date, declares the conveyance to be in trust for the said A. B. and his heirs, the said A. B. may afterwards, upon the happening of an avoidance, be legally presented by his said trustee." Fearne's Posth. Works, 409. See the Rev. Henry Sir Henry Bate Dudley's Life, Annual Biography, 1825, Appendix.

[J. It appears, from an observation made by Mr. Bythewood, in his copy of the present work, that he did not coincide in the view taken by Mr. Fearne. That view, however, is consistent with the generally received opinion of the profession upon the subject, and, it is conceived, with the sound construction of the statute; for it seems to be impossible, without a manifest departure from the strictness of construction which is always given to a penal statute, to treat the words "next avoidance or presentation," as extending to an advowson.J.]

Purchase of next presentation, with intention to present a certain person, not simony, it seems.

(*b*) Where a person purchased the next presentation to a benefice, the church being then full, with an intention to present a particular person, a subsequent presentation of that person was formerly deemed simony; but it is now a universal practice to purchase the next presentation to a living, the church being full; and there is no modern instance where presentation under such circumstances has been questioned. 3 Cru. Dig. 33, 2nd ed. See *Fox* v. *Bishop of Chester*, 1 Dow. & Cl. 416; and further as to Simony, *infra*, title BOND.

Title to advowson.

(*c*) [*Vide ante*, p. 68. Where the advowson appears to be appendant to a manor, a sixty years' title is usually, but perhaps without great reason, considered sufficient.]

next presentation to the said rectory and parish church unto the said [*purchaser*], his executors, administrators, or assigns (*a*), or as he or they shall direct; in which all proper and

29. PURCHASE OF NEXT PRESENTATION TO PARSONAGE.

(*a*) [The right of presentation on the next avoidance is part of the advowson, and, while the church remains full, devolves with it on the heir; but if the right to present for the next turn is separated from the advowson, it is a chattel and goes to the executor. *Smithley* v. *Chomely*, Dyer, 135 a; Wentw. Offi. Ex. 36, Wilson's Ed.; 13 Vin. Abr. 84, *Faits*, M. A., pl. 24; 7 Bligh, 256.]

Next presentation when separated is a chattel.

[Immediately upon the happening of a vacancy, the right of nomination (in case of a *presentative* advowson) becomes a distinct right, in the nature of a chattel, separate from the advowson, in the same manner as rent due is distinct from the rent-charge in fee in respect of which it became due. *Alston* v. *Atlay*, 2 Nev. & P. 492. It is a *profit*, which becomes due the moment it is exercisable. In some cases this interest is called "a *chose en action*;" *Leach* v. *Babington*, Cr. El. 811; in some, a "chattel," as in *Fane and the Archb. of Canterbury's case*, 4 Leon. 109. In others, as Fitzh. N. B. *Quare impedit*, 34, N.; and 3 Keble, 152, "a chattel vested;" a "personal chattel," Vin. Abr. *Executor*, Z. 2, pl. 4, n.; "a chattel vested and severed from the manor," (in case of an advowson appendant), Fitzh. N. B. 33, P. In one it is called "a personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy;" also, "a thing in right, power, and authority;" and also "a *chose en action*, and, in effect, the *fruit* and *execution* of the advowson, and not any advowson," by six justices, in *Stephens* v. *Wall*, Dyer, 283 a. In 3 Leon. 256, "a power to present, and an authority annexed to the person." In *Digby* v. *Fitch*, Brownl. & Gouldsb. 167, Justice *Warburton* said—"The presentment is the possession in *quare impedit*, as in rent the reserving, in common, the taking of the profits." In *Brooksby* v. *Wickham*, 1 Leon. 167, it is also compared to rent, and this analogy will be found to be the most perfect. The advowson is the estate which descends, may be conveyed, limited, and escheats as such. The presentation is the mode of enjoyment, the profit, or rent of the estate, and, like the rent or profit, belongs to the owner of the estate, at the time it accrues, in the nature of a personal chattel, distinct and severed from the inheritance:—it belongs to him not as owner, but as an individual. Per *Parke*, J., *Mirehouse* v. *Rennell*, 7 Bligh, 277. If a vicarage happen void, and before the parson present, he is made a bishop, &c., yet he shall present to this turn, because it is a chattel vested in him. Fitzh. N. B. 34. Thus in an old case, it is laid down, that if an advowson comes to the Queen for forfeiture by outlawry, and then the church becomes void, and the Queen presents, and then the outlawry is reversed for error, yet the Queen shall enjoy the presentment, because it came to the Queen as a profit of the advowson; but if the church be void at the time of the outlawry, and the presentment be forfeited as a chattel principal and distinct, and then the outlawry is reversed, the party shall have restitution of the presentment. *Beverley and Cornwall's case*, Moore, 269. So a lessee of an advowson may present, after his term has expired, to a vacancy which

Nature of the right to present after a vacancy. It goes to the executor.

Forfeiture of advowson.

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necessary parties and persons beneficially interested in the purchase-money shall join; and which shall contain the usual

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Right of presentation.

occurred during the term. See Fitzh. N. B. *Quare impedit*, 33, A.; 2 Roll. Ab. 345; 7 Bligh, 261. And where a married woman is entitled to an advowson, and dies during a vacancy, the presentation is in her husband, although he be not entitled by the curtesy. See Co. Litt. 29 a, 120 a, 388 a. So, if a vicarage happen void, and before the parson present, he is made a bishop, &c., yet he shall present to the vicarage, for it was a chattel vested in him. Fitzh. N. B. 34, N.]

Death of patron during vacancy.

[Therefore, if a person seised in fee or in tail of a presentative advowson, appendant or in gross, die after an avoidance, and without having presented a successor, the right of presentation vests in the executor and not in the heir. Br. Ab. *Presentacion*, 34; Fitzh. N. B. 33; Co. Litt. 388 a; Dy. 283 a; Com. Dig. *Esglise* (H. 2); *The Queen, Fane, and Archbishop of Canterbury's case*, 4 Leon. 109: *Repington* v. *Governor of Tamworth School*, 2 Wils. 150. But where the patron in fee is himself the incumbent, and dies, as the titles of the heir and executor accrue at the same moment, the "elder" title of the heir is preferred. *Holt* v. *Bishop of Winchester*, 3 Lev. 47: 7 B. & Cr. 147.]

Where patron is incumbent.

In the case of a *donative*, a void turn goes to the heir.

[As the heir of a donative patron is not affected by the law of lapse, nor compellable at common law to appoint to a vacancy, and may take the profits during the vacancy (*ante*, p. 559), a right of appointing the successor in the executor would be clearly adverse to his interest, and this appears to be the foundation of the rule, that if the patron of a donative advowson in fee die during a vacancy, the heir, and not the executor, shall present. *Repington* v. *Governor of Tamworth School*, 2 Wils. 150; 7 B. & Cr. 151.]

Right of presentation where ecclesiastical patron dies during a vacancy.

[The right of presenting, when vested, being a chattel, and it being an established rule that a corporation sole cannot take a chattel by succession, (*Fulwood's case*, 4 Rep. 450, except by custom, as by the custom of London a bond to the Chamberlain for orphanage money will pass to the successor, *Byrd* v. *Wilford*, Cr. El. 464, or in the case of the Crown), it follows that, where an advowson presentative is vested in an ecclesiastical person, and he dies during a vacancy, his executor, or in the case of a bishop, the Queen, and not his successor, shall present. Thus where a prebendary, who had the advowson of a rectory in right of his prebend, died during the vacancy of the church, his personal representative was held entitled for that term. *Rennell* v. *Bishop of Lincoln*, 7 B. & Cr. 113, reversing judgment in C. P., 11 J. B. Moore, 139; affirmed in Dom. Pr. *Mirehouse* v. *Rennell*, 1 M. & Sc. 643; 7 Bligh, 241.]

Presentation of an advowson collative on death of bishop.

[But when a bishop dies, a church being vacant in his life, the Queen, and not the bishop's executor or administrator, shall present, taking the void turn as part of the temporalities; and where a tenant by knight service, *in capite*, with an advowson appendant, which had become void in his life, died, his heir within age, the King presented, and not the executor or administrator, who would have been entitled if the land had been holden of a subject. Co. Litt. 388 a. But these exceptions are referable to the prerogative, and do not shew that the void

and proper covenants for title, quiet enjoyment, and further assurance; and shall be prepared by, and at the expense of, the said [*purchaser*]: AND also to deliver, at his own charges, to the said [*purchaser*], at the execution of the said conveyance, true and attested copies of the several title deeds, evidences, and writings, relating to the said rectory and parish church; *And* by the same conveyance covenant, in the usual manner, to produce the same title deeds, evidences, and writings, and to permit the said [*purchaser*] to have future copies thereof at his own charges (*e*); AND THE SAID [*purchaser*] agrees, upon the execution of the said conveyance, to pay the said [*vendor*] the said sum of £——. (*Add*

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To deliver attested copies; and covenant to produce deed.

To pay purchase-money.

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turn remains parcel of the advowson; for though the Queen omits to present in the one case till she restore to the bishop his temporalities, or in the other till the heir, being of age, obtain his livery, still the presentation for that term remains in the Crown. Fitzh. N. B. 33, (*N. O.*); 7 Bligh, 280.]

[Another exception, founded on the prerogative, or rather, perhaps, in analogy with the rule as to donatives, is, that when the Queen dies, leaving a church void, her successor shall present, as she is entitled to the temporalities where the predecessor died *sede vacante*. See 7 Bligh, 308.]

[These cases of advowsons must be distinguished from other rights of appointment which are annexed to an office, for if a person holding an office, in right of which he presents to another office, dies during a vacancy, his successor and not his executor shall appoint to the office, as in the case of *exigenter*. *Scroggs* v. *Coleshill*, Dyer, 175. The reason is, that it is a personal thing annexed to the Judge of the Court who is to appoint the officers of the Court; and if the office becomes vacant and the Judge dies, his executor can have nothing to do with the appointment, for it belongs to the Judge to appoint the officers of the Court. The office of a Judge is not like an advowson, which is a thing that descends, and is capable of being conveyed from one person to another, and the presentation of which is the fruit of the advowson. Per *Littledale*, J., 7 B. & Cr. 165. If the office were an office of profit and saleable, it would perhaps be otherwise.]

Appointment in right of office.

(*e*) The mortgagee of an advowson, whether appendant or in gross, has the legal right to present; but, until foreclosure, a Court of Equity will compel him to present the nominee of the mortgagor: because the mortgagee can make no profit by presenting to the church, nor can he account for any value in respect of it to sink or lessen his debt. [*Vide infra*, Vol. 5, p. 312.] So a trustee must present the clerk of the *cestui que trust*. 2 Atk. 483; 2 W. Blacks. Rep. 1053.

Mortgagee and trustee must present nominee of mortgagor, &c.

[It is obvious therefore that an advowson can only be made available as a security to a mortgagee, or an annuitant, by means of a power of sale. See a Precedent of such a power in a Grant of Annuity, *post*, Vol. 4, p. 141, and *vide infra*, Vol. 5, p. 212, Vol. 6, p. 238.]

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clauses—time to be the essence of the contract, and for liquidated damages, ut ante, pp. 542, 546). AND *it is further agreed* (*f*), that if the present or any succeeding incumbent of the said rectory should at any time hereafter during his incumbency of the said rectory be created a bishop, whereby the right of presentation to the same rectory may devolve to the Crown, then the said [*purchaser*] shall have the first or next turn or right of presentation to the said rectory, after the Crown. IN WITNESS &c. (*g*).

If present or succeeding incumbent be made a bishop, purchaser to have the next presentation.

As to providing for promotion of incumbent.

(*f*) This being the rule of law on the subject, *ante*, p. 564, n., it is mentioned on an honourable principle, that the purchaser may be aware of it, and provide accordingly. When it is probable the incumbent will be promoted to a bishopric, and sometimes when it is not probable, it is usual to insert a provision, should that event happen, to make a proportionable deduction from the purchase-money, to be ascertained by two arbitrators, or their umpire; or to re-pay the purchase-money, with interest at five per cent.

Stamp.

(*g*) [Although under an agreement for a next presentation, equity would compel the vendor to present the purchaser's nominee, the agreement does not require an ad valorem stamp. *Wilmot* v. *Wilkinson*, 9 Dowl. & R. 620; 6 B. & Cr. 506.]

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30. SALE OF NEXT PRESENTATION BY TENANT IN TAIL IN REMAINDER.

30. [CONTRACT *for* SALE, *by a* TENANT IN TAIL, IN REMAINDER, *expectant on the decease of a Tenant for Life, of the* NEXT PRESENTATION *to a* RECTORY *in the event of the Tenant in Tail being entitled in possession on its falling vacant; with* COVENANT *to* REFUND *the* PURCHASE-MONEY, *in the event of the Tenant in Tail* NOT SO BECOMING ENTITLED, &c. *A* BOND *is taken as further Security for Refunding the Purchase-Money in the specified events.*

Parties.

ARTICLES OF AGREEMENT indented and made the —— day of ——, in the year ——, BETWEEN [*tenant in tail*], of the one part; and [*purchaser*], of the other part.

Recital of title to advowson as tenant in tail in remainder.

WHEREAS the said [*tenant in tail*] is lawfully entitled in tail male general to the perpetual advowson or right of

30. SALE OF NEXT PRESENTATION BY TENANT IN TAIL IN REMAINDER.

patronage and presentation of, in, and to the rectory and parish church of ——, in the county of ——, with the appurtenances, in remainder, expectant on the decease of [*tenant for life*]; AND WHEREAS the Rev. [*incumbent*] is the present incumbent of the said rectory and parish church of ——, and is now of the age of —— years or thereabouts. Age of incumbent.

NOW THESE PRESENTS WITNESS, that in consideration of the sum of £—— of lawful British money by the said [*purchaser*] to the said [*tenant in tail*] paid at or before the sealing and delivery of these presents, the receipt and payment of which sum of £—— he, the said [*tenant in tail*], doth hereby acknowledge, and thereof, and of and from the same, and every part thereof, doth acquit, release, and discharge the said [*purchaser*], his heirs, executors, administrators, and assigns, and every of them, by ever, by these presents; HE, the said [*tenant in tail*], for himself, his heirs, executors, administrators, and assigns, *doth* hereby covenant and agree, with the said [*purchaser*], his executors, administrators, and assigns, in manner following, that is to say; THAT in case and in the event of the death of the said [*tenant for life*], in the lifetime of the said [*tenant in tail*], and also the death, resignation, cession, deprivation, or avoidance of the said rectory and parish church of ——, in the lifetime of him the said [*tenant in tail*], and after the decease of the said [*tenant for life*], he the said [*tenant in tail*] will sell and assure unto, and at the expense of the said [*purchaser*], his executors, administrators, and assigns, The now first and next nomination, presentation, and free disposition of, in, and to the said rectory and parish church of ——, with the appurtenances, for all the now first and next vacation or avoidance of the same. AND FURTHER, that inasmuch as the main purpose and intent of the said [*purchaser*], in contracting for the purchase of the said now first and next presentation and free disposition of and to the said rectory or parish church of ——, upon the terms herein expressed, was and is understood and admitted by the said [*tenant in tail*] to be, that he the said [*purchaser*], his executors, administrators, or assigns, may be thereby enabled to present thereto any son of his who, in the happening of the events, may then be in holy orders and capable of taking and holding the same, and that if he should not then have any such son who shall so then be in holy orders, and capable of taking and holding as aforesaid,

Agreement to sell next presentation in case it falls vacant while vendor's estate is in possession;

Purchaser's object is to present one of his sons;

30. SALE OF NEXT PRESENTATION BY TENANT IN TAIL IN REMAINDER.

then, that he may, in such case, be enabled to present thereto some other fit and proper person, who shall then be in holy orders, and so capable of taking and holding as aforesaid, on a bond of resignation by such person to vacate the living of the said rectory and parish church, in favour of one of two sons of him the said [*purchaser*], in such bond to be specially named and described, who shall thereafter take holy orders, and be capable of holding the same living, *It shall and may be lawful* to and for the said [*purchaser*] his executors, administrators, or assigns, in such before-mentioned event of the decease of the said [*tenant for life*], in the lifetime of the said [*tenant in tail*], and also the decease, resignation, or avoidance of the before-named present incumbent in the lifetime of the said [*tenant in tail*], and after the decease of the said [*tenant for life*], by force and virtue of these presents, and of the conveyance to be made pursuant thereto, to present to the said rectory, and to the diocesan of the same, or any competent in that behalf, when the church shall, by death, resignation, privation, cession, or other means first and next after the date of these presents, happen to be void, any son of him, the said [*purchaser*], who, in the happening of the events, may then be in holy orders, and capable of taking and holding the same; and if the said [*purchaser*] shall not then have any such son, who shall so then be in holy orders, and capable of taking and holding as aforesaid, then some other fit and proper person, who shall then be in holy orders, and so capable of taking and holding as aforesaid, on a bond of resignation by such person to vacate the living of the said rectory and parish church in favour of one of two sons of him the said [*purchaser*], in such bond to be specially named and described, who shall thereafter take holy orders, and be capable of holding the same living. AND LASTLY, it is hereby declared and agreed, and he the said [*tenant in tail*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*purchaser*], his executors, administrators, and assigns, that he the said [*tenant in tail*] will, at his own expense, make and deliver unto the said [*purchaser*], or his solicitor, an abstract of the title of him the said [*tenant in tail*] to the said advowson, right of patronage, and presentation of and to the rectory and parish church of ——. And that, in case the decease of the said [*tenant for life*] shall not happen in the lifetime of the said

or a stranger, in trust to resign in favour of one of purchaser's sons, when he shall become competent.

Vendor to deliver abstract.

—to refund purchase-money if the next

[*tenant in tail*], or in case the decease, resignation, or avoidance of the before-named present incumbent of the said rectory and parish church of —— shall not happen in the lifetime of the said [*tenant in tail*], or shall happen in the lifetime of the said [*tenant for life*], then, and in either of such cases, he the said [*tenant in tail*], his heirs, executors, or administrators, will or shall, within the space of six months next after the decease of the said [*tenant for life*], well and truly refund and pay, or cause to be refunded and paid unto the said [*purchaser*], his executors, administrators, and assigns, his said consideration money, or sum of £——, together with interest for the same from the day of the date of these presents, at and after the rate of £—— per centum per annum, and will or shall make each payment free from and without deduction or abatement on any account whatsoever. IN WITNESS &c.]

30. SALE OF NEXT PRESENTATION BY TENANT IN TAIL IN REMAINDER.

avoidance does not fall in his time.

With interest.

30 *a*. [BOND *to accompany the preceding Indenture.*

30 *a*. BOND TO REFUND PURCHASE-MONEY.

KNOW ALL MEN BY THESE PRESENTS, *That I,* [*tenant in tail*], of &c., am held and firmly bound unto [*purchaser*] of &c., in the penal sum of £——, of lawful money of Great Britain, to be paid to the [*purchaser*], or his certain attorney, executors, administrators, or assigns; for which payment to be well and truly made, I bind myself, my heirs, executors, and administrators, firmly, by these presents, sealed with my seal. Dated the —— day of ——, in the year of our Lord ——.

Bond.

WHEREAS (*recite title to advowson, ut ante*, p. 572). AND WHEREAS, in consideration of the sum of £——, which hath this day been paid by the above-named [*purchaser*] to the said [*tenant in tail*], the receipt whereof he the said [*tenant in tail*] doth hereby acknowledge, he the said [*tenant in tail*] hath contracted and agreed with the said [*purchaser*], that in case (*recite contract, ut ante*, p. 573). AND in pursuance of and for effecting the said contract, the said *tenant in tail*] hath entered into the above bond or obligation, subject to the condition hereinafter contained: NOW THEREFORE THE CONDITION OF THE ABOVE-WRITTEN

Condition.

Recitals.

30 *a.* BOND TO REFUND PURCHASE-MONEY.

BOND OR OBLIGATION IS SUCH, *that* if, in case the decease of the said [*tenant for life*] shall not happen in the lifetime of the said [*tenant in tail*], or in case the decease, resignation, or avoidance of the before-named present incumbent of the said rectory, or parish church of ——, shall not happen in the lifetime of the said [*tenant in tail*], or shall happen in the lifetime of the said [*tenant for life*], he, the said [*tenant in tail*], his heirs, executors, or administrators, shall and do within the space of six calendar months next after the decease of the said [*tenant for life*], well and truly refund and pay, or cause to be refunded and paid unto the said [*purchaser*], his executors, administrators, or assigns, the said consideration money, or sum of £——, together with interest for the same, from the day of the date of the above-written bond or obligation, at and after the rate of £—— per centum per annum, and shall and do make such payments free from and without any deduction or abatement on any account whatsoever, *Then* the above-written bond or obligation shall be void, and of no effect, but otherwise shall be and remain in full force and virtue.]

Condition.

31. PURCHASE OF FREEHOLD, COPYHOLD, AND LEASEHOLD.

31. AGREEMENT *for the Purchase of* FREEHOLD, COPYHOLD, *and* LEASEHOLD *Premises, for Lives and for Years.*

ARTICLES OF AGREEMENT, made and entered into the —— day of ——, 18—; BETWEEN [*vendor*], of &c., for himself, his heirs, executors, and administrators, of the one part; and [*purchaser*], of &c., for himself, his heirs, executors, and administrators, of the other part.

Parties.

FIRST, the said [*vendor*], in consideration of the sum of £——, agrees to sell to the said [*purchaser*] the fee-simple and inheritance in possession of ALL THAT messuage or tenement, lands, and premises, situate at ——, in the county of ——, called —— Farm, containing by estimation

Agreement to sell.

Parcels.

Freehold.

—— acres, more or less, and now in the occupation of ——; AND ALSO the inheritance in possession, according to the custom of the manor of ——, in the said county of ——, of and in ALL THOSE several closes of arable land, situate in the said manor, containing by estimation —— acres, more or less, and now in the occupation of ——: AND ALSO the estate of him the said [*vendor*], for the lives of [*nominees*], granted and demised by indenture, bearing date on or about the —— day of ——, 17—, and made between [*lessor*], of &c., of the one part, and the said [*vendor*], of the other part (*a*); (and afterwards perfected by livery of seisin), of and in ALL THAT piece of meadow land, situate, &c. AND ALSO ALL THOSE three cottages, situate, &c., and now held by the said [*vendor*], for the remainder of a term of —— years, granted by indenture, bearing date on or about the —— day of ——, 17—, and made between [*lessor*], of &c., of the one part, and the said [*vendor*], of the other part: AND ALSO, at his costs, to make and deliver unto the said [*purchaser*], full, complete, and perfect abstracts of the title of the said [*vendor*] to the said freehold, copyhold, and leasehold premises respectively; but the said [*vendor*] shall not be required to produce any further evidence of the title to the said leasehold premises, for lives and for years, than the original leases, and all subsequent deeds and evidences relating thereto respectively: AND ALSO on or before the —— day of —— next, upon receiving the said purchase-money, by good and sufficient conveyances, surrenders (*b*), assign-

31. PURCHASE OF FREEHOLD, COPYHOLD, AND LEASEHOLD.

Copyhold.

For lives.

Reference to lease.

For years.

Reference to lease.

To deliver abstracts of title.

To convey.

(*a*) If the estate for lives were created under a power deriving its effect from the statute of uses, livery of seisin would be unnecessary. See Noy's Maxims, 293, 9th Ed.

(*b*) It is a good custom in a manor, that the steward or his deputy should have the sole right of preparing all the surrenders of copyhold tenements within the manor; and the court of Queen's Bench will not grant a *mandamus* where there is such a custom commanding the steward to receive and examine a surrender prepared by any other person, although the requisite fees, &c., have been tendered. *Rex* v. *Rigge*, 2 Barn. & Ald. 550. [See *Reg.* v. *Bishop's Stoke*, 8 Dowl. P. C. 608. The steward must make out his claim upon the *quantum meruit*, or upon the custom of the particular manor. *Everest* v. *Glyn*, 7 Taunt. 425.]

By custom, steward may have sole right of preparing surrenders.

Where there is no such custom, and where, by the custom, surrenders may be made out of Court, they are frequently prepared by the party's own solicitor. However, they are usually prepared by the steward; and if this practice were more general, it would sometimes prevent much mischief, inconvenience, and expense to the parties; as the

31. PURCHASE OF FREEHOLD, COPYHOLD, AND LEASEHOLD.

ments, and assurances, to be prepared by and at the costs of the said [*purchaser*], and with the usual and other proper covenants for the title, for quiet enjoyment, and for further assurance; and with all necessary and proper parties, and persons beneficially interested in the purchase-money, to convey, surrender, assign, and assure unto the said [*purchaser*], or as he shall appoint, the said freehold, copyhold, and leasehold premises respectively, free from all incumbrances; *But subject* to the rents and services for the said copyhold premises, and to the rents, covenants, and conditions, mentioned in the said indentures of lease, from the said —— day of —— next: AND ALSO that any covenant for production of title-deeds, release, assignment, or surrender of any incumbrances, and of outstanding terms not already assigned to attend the inheritance, which shall be requisite or necessary to perfect the title to the said premises, or any of them, shall be made and prepared respectively, by and at the expense of the said [*vendor*]: AND THE SAID [*purchaser*], agrees upon the making of the said conveyances, surrenders, assignments, and assurances, to pay unto the said [*vendor*] the said purchase-money: AND ALSO, if required by the said [*vendor*] to covenant in the conveyance and assignment of the said leasehold premises, for payment of the rents, and performance of the covenants, in the said indenture of lease reserved and contained respectively; and to indemnify the said [*vendor*] therefrom: or otherwise, if required by the said [*vendor*], to execute a bond in a sufficient penalty, or a deed of covenant, to be prepared by and at the costs of the said [*vendor*], for payment and performance of the same rents and covenants, and for indemnifying the said [*vendor*] therefrom (*c*). (*If a part only of the lease-*

Subject to rents, &c.

Vendor to pay for assignments of terms, &c.

To pay purchase-money.

Purchaser to covenant for payment of rent, &c., for leasehold, and to indemnify therefrom.

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steward is better acquainted with the different modes and customs of the manor, and with the customary tenements, than any stranger can be. See Fisher on Copyholds, 307, 2nd Ed.

Vendor of leaseholds bringing an action on purchaser's covenant may compel production of deed.

(*c*) [J. For a form of such a bond, *vide post*, Vol. 4, p. 210. A separate bond or covenant is convenient, because the purchase deed, which otherwise contains it, is in the hands of the covenantor himself; though, in such a case, if the vendor bring an action on the purchaser's covenant, the Court will compel him to produce it, and allow the plaintiff to take a copy, at his (the plaintiff's) expense. *Blakey* v. *Porter*, 1 Taunt. 386: *King* v. *King*, 4 Taunt. 666. Where the deed contains any covenant on the part of the purchaser the vendor should always retain a copy. J.]

hold premises are sold; or if the consent of the lessor be necessary, vide ante, pp. 550, 551, 552, 553. *If the title deeds relate to other premises, vide ante,* p. 560. *Add clause as to errors in description, ut ante,* p. 540; *as to time being the essence of the contract, ut ante,* pp. 456, 546; *for liquidated damages, ut ante,* p. 542). IN WITNESS &c. 31. PURCHASE OF FREEHOLD, COPYHOLD, AND LEASEHOLD.

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32. AGREEMENT *for the Purchase of* GROWING TIMBER. 32. PURCHASE OF GROWING TIMBER.

ARTICLES OF AGREEMENT indented, made, and entered into the —— day of ——, 18—; BETWEEN [*vendor*] (*a*), of &c., of the one part; and [*purchaser*], of &c., of the other part. Parties.

FIRST the said [*vendor*], in consideration of the sum of £——, of lawful money of Great Britain, to be paid by the said [*purchaser,*], in manner hereinafter mentioned, and of the covenants and agreements hereinafter contained, and which by the said [*purchaser*], his executors, administrators, and assigns, are to be observed and performed, *Hath* granted, bargained and sold, and by these presents *Doth* grant, bargain and sell, unto the said [*purchaser*], his executors, administrators, and assigns, ALL and singular the timber trees, and other trees hereinafter mentioned, being all set Vendor. sells timber.

(*a*) As tenant in tail is restrained from aliening the estate without an enrolled conveyance, now substituted for a fine or recovery, so he is restrained from charging it, or disposing, by contract or agreement, of the lasting improvements after his death. Therefore, if tenant in tail article for sale of the trees growing on the inheritance, the vendee must sever them during the life of tenant in tail; for if he die before they are cut down, his issue shall have them as part of the inheritance, and the vendee shall not be permitted, after the death of tenant in tail, to fell one tree, though it be half cut down: for, as the tenant in tail has power over the inheritance only during his own life, he cannot delegate that power to another for a longer time: and consequently, whatever remains part of the inheritance at the death of tenant in tail, when his power over it ceases, must necessarily go to the heir to whom the inheritance belongs. Bro. Abr. *Contract,* &c., 26: *Liford's case.* 11 Co. 50 a; Poph. 194; Hob. 173: 1 Pow. Contr. 127; 3 Bac. Abr. 64, n; Com. Dig. *Biens* (H). Sale of timber, &c. by tenant in tail.

32. PURCHASE OF GROWING TIMBER.

out and marked for sale, and standing, growing, and being in the several places hereinafter mentioned, that is to say, —— hundred oak trees, marked with the letter S, together with the boughs, lops, tops, and bark thereof: AND ALSO —— hundred ash and elms, also marked with the letter S, together with the boughs, lops, tops, and bark thereof, standing, growing, and being in and upon the demesne or demesne lands of ——, and in and upon several lands and grounds, called ——; all which premises are now in the possession of ——: TOGETHER WITH (*b*) full and free liberty, power, and authority, for the said [*purchaser*], his servants, agents, and workmen, and every of them, to fell and cut down the said trees, at all reasonable and convenient times, and to lay and place the bark of the oak trees in convenient parts of the premises to dry: AND the said trees and wood, with the bark of the oaks, and the boughs, lops, and tops, of the whole of the said trees, to draw, remove, carry off, and take away in shares, in and by the most usual and convenient ways and parcels, at any time on or before the twenty-ninth day of September next: *And also*, free liberty, power, and authority to and for the said [*purchaser*], his executors, administrators, or assigns, and his and their servants, agents, and workmen, and other person and persons to whom they shall sell and retail the said timber and wood, or any part thereof, to dig saw-pits and break up and saw the said timber in proper and convenient parts of the said premises in and upon which the said timber and wood stand and grow, at any time before the said twenty-ninth day of September next, without paying or making any satisfaction to the said [*vendor*], his heirs, assigns, or undertenants. AND THE SAID [*purchaser*], in consideration of the premises, and the bargain and sale of the said trees and bark, made to him as aforesaid, *Doth* for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendor*], his executors, administrators, and assigns, by these presents, that he the said [*purchaser*], his heirs, executors, or administrators, or some of them, will or shall

Power to cut and carry away timber.

Power to dig pits to saw timber on premises.

Covenant to pay purchase-money on certain days.

(*b*) Although, on a grant or sale of trees, a right to cut them down and carry them away is implied by law; Noy's Maxims, 55, 9th Ed.; Plow. Com. 16; Finch's Law, 63; 11 Co. 52 a; [*vide* also as to this principle, *post*, Vol. 4, p. 156;] yet it is prudent to insert this provision, as it gives greater powers than the law would imply.

32. PURCHASE OF GROWING TIMBER.

well and truly pay or cause to be paid unto the said [*vendor*], his executors, administrators, or assigns, the sum of £——, of lawful money of Great Britain, in manner following, that is to say (*mention the days of payment*), without any fraud or delay in any wise: AND ALSO that he the said [*purchaser*], his executors, administrators, or assigns, will or shall fell, hew, and cut down the said oak, ash, and other trees, and every of them, and draw, remove, and take away the same, with the boughs, lops, tops, and bark thereof, within the time before limited and agreed on for that purpose, and according to the true intent and meaning of these presents: AND ALSO will or shall, within one month next after the said twenty-ninth day of September next, at his or their own costs and charges, fill up all such saw-pits as shall for the purposes aforesaid, have been made by him or his servants, or any of the said lands; *And also* fence, amend, and repair, all the hedges and fences in and about the said lands, in all such places as shall be broken, or otherwise damaged or destroyed, in felling, hewing, or carrying away the said timber, on being allowed by the said [*vendor*] hedge-wood for that purpose. AND *it is further agreed*, that if any dispute should arise between the said parties, touching any clause, matter, or thing, relating to the sale of the said timber, the same shall be referred to and finally settled by two indifferent persons, one of whom, to be chosen by each of the said parties; and if such two persons should not agree, then by an umpire to be chosen by them (*c*). IN WITNESS &c.

Covenant by purchaser to cut down and remove timber, &c. by times agreed on.

To fill up saw-pits,

and repair hedges.

Disputes to be referred to arbitration, or umpirage.

(*c*) If the vendor be tenant in tail, say,

"AND ALSO that if the said [*vendor*] should die before the said twenty-ninth day of September next, and the said [*purchaser*] should be prevented from felling, sawing, or carrying away the said timber, as aforesaid, then the executors or administrators of the said [*vendor*] shall pay or allow unto the said [*purchaser*], such sum of money, by way of damages, as he shall thereby sustain; the same to be ascertained by arbitration, or arbitration and umpirage, as aforesaid *."

If vendor die before removal purchaser to have allowance.

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* *Vide ante*, 579, n.

33. AGREEMENT TO SETTLE DISPUTED BOUNDARIES OF CHURCH LANDS.

33. [AGREEMENT *between the* DEAN AND CHAPTER *of a Cathedral, and a* LESSEE *of Lands held under the Dean and Chapter, and a* HUSBAND *and* WIFE, *seised in right of the Wife of an* ADJOINING ESTATE, *in Fee, to* REFER *the settlement of the* BOUNDARIES *of the Premises held by the two Parties respectively to* [*A. B.*] (*a*).

THIS INDENTURE, made the —— day of ——, BETWEEN the Dean and Chapter of the Cathedral Church

Parties.

(*a*) [The stat. 2 & 3 Will. 4, c. 80, intituled, "*An Act to authorize the identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations*," after reciting that "the archbishops and bishops of the several dioceses, and the deans, and deans and chapters, archdeacons, prebendaries, and canons, and other dignitaries and officers of the several cathedrals and collegiate churches and chapels, and the masters or other heads, and fellows and scholars or other societies of the several colleges and halls in the universities of Oxford and Cambridge, and of the colleges of Winchester and Eton, are proprietors of divers manors, messuages, lands, tenements, tithes, and hereditaments; and in many cases the boundaries or quantities and the identity of lands within such manors, and of such messuages, lands, tenements, and hereditaments, and of lands subject to any such tithes, or some part or parts thereof, are unknown or disputed, and it would be a great benefit, as well to such proprietors respectively, as to their lessees, copyhold or customary tenants, sub-lessees, or under-tenants, their, his, or her heirs, executors, administrators, or assigns, if the said manors, messuages, lands, tenements, tithes, and hereditaments were identified and the boundaries and quantities thereof ascertained and finally settled:" enacts, sect. 1, "that from and after the passing of this act it shall and may be lawful to and for any archbishop, bishop, dean, dean and chapter, or other corporation aggregate or sole hereinbefore mentioned, to enter into an agreement of reference or deed of submission with his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or with the owner or owners of any other hereditaments adjoining to or intermixed with the said manors, messuages, lands, tenements, tithes, or hereditaments, whereby it shall be agreed that any unknown or disputed boundaries or quantities of such manors, messuages, lands,

Stat. 2 & 3 Will. 4, c. 80. Boundaries of church property. Royal assent, 3rd Aug. 1832.

Archbishops, bishops, deans and chapters, &c. may enter into agreements or deeds of reference with their lessees, to ascertain and settle unknown or disputed boundaries or quantities of manors, &c. leased.

of ——, in ——, of the first part; [*lessee*], of &c. of the second part; and [*husband*], of &c., and [*wife*], his wife, of the third part (*b*).

33. AGREEMENT TO SETTLE DISPUTED BOUNDARIES OF CHURCH LANDS.

(*b*) [If the consent of any spiritual superior is requisite, (see 2 & 3 Will. 4, c. 80, s. 2), such person should be made a party.]

tenements, tithes, or hereditaments, or any part thereof, shall be referred to the adjudication of such person or persons as may be agreed upon and named by the said archbishop, bishop, dean, dean and chapter, or other corporation aggregate or sole, and by his or their lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, his, her, or their heirs, executors, administrators, or assigns, or by such owner or owners of any other hereditaments situate as aforesaid; and that such referee or referees shall be fully authorised to make or cause to be made surveys, maps, and admeasuremensts of the said manors, messuages, lands, tenements, tithes, and hereditaments, or any part thereof, and to summon any persons as witnesses, and examine them on oath (which oath he or they are hereby authorised to administer) touching or concerning any of the matters or things so referred as aforesaid, or in any way relating thereto: and also to call for the production of all surveys, maps, deeds, books, papers, and writings in the custody or power of any of the parties to the said reference, or of any other person or persons, of or concerning the matters in question; and the said referee or referees, having well and sufficiently investigated and considered the same, and all matters to him or them referred, shall and may make his or their award or awards in writing, under his or their hand and seal or hands and seals, with a map or maps drawn thereupon or thereunto annexed, and which said award or awards and map or maps shall be upon parchment or vellum, and shall award and determine, identify, delineate, and describe the boundaries, quantities, particulars, and situations of the said manors, messuages, lands, tenements, tithes, and hereditaments, so referred to him or them as aforesaid; and the said award or awards and map or maps shall be laid before all the parties to any such agreement of reference or deed of submission, including the party or parties whose consent is required by this act, whose approbation thereof shall be written upon the said award or awards and shall be signed and sealed by them, and thereupon the said award or awards and map or maps shall be for ever afterwards binding upon all parties, and final and conclusive as to all matters therein contained or thereby referred to."

Referees to make surveys, maps, and admeasurements; to summon and examine witnesses on oath,

to call for all deeds, &c.;

to make awards, with maps thereto, on parchment or vellum.

Awards and maps to be laid before parties, and their approbation to be written.

Sect. 2. "That in every case in which any of the powers hereinbefore contained shall be exercised by any bishop, dean, archdeacon, prebendary, or other ecclesiastical corporation sole, the deed of submission or agreement of reference, and also the approbation of the award, shall, in the case of a bishop, be executed by the archbishop of the province testifying his consent thereto; or in case of a dean, the same shall be executed by the dean and chapter testifying their consent thereto; or in the case of an archdeacon, prebendary, or other ecclesiastical corpo-

Certain consents required to render valid proceedings under this act.

33. AGREEMENT TO SETTLE DISPUTED BOUNDARIES OF CHURCH LANDS.

WHEREAS by an indenture of lease, bearing date on or about the —— day of ——, and made or expressed to be

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ration sole, the same shall be executed by the archbishop or bishop of the diocese, testifying his consent thereto."

Power to infants, married women, lunatics, &c., to enter into reference.

Sect. 3. "That from and after the passing of this act it shall and may be lawful to and for the said lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, who at the time of making any reference authorised by this act shall be tenant or tenants in fee-tail, general, or special, or for life or lives, and for the guardians, husbands, committees, or attornies of or acting for any such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, who, at the time of making any such reference, shall be respectively an infant or infants, *feme covert* or *femes covert*, or of unsound mind, or beyond the seas, or under any other legal disability, or otherwise disabled to act for themselves, himself, or herself, to sign, seal, and deliver any agreement of reference or deed of submission or approbation of any award or awards and map or maps authorised by this act to be made, as fully and effectually to all intents and purposes as if such lessee or lessees, copyhold or customary tenant or tenants, sub-lessee or sub-lessees, under-tenant or under-tenants, and such other owner or owners, as hereinbefore named, his, her, or their heirs, executors, administrators, or assigns, had been tenant or tenants in fee-simple, and of full age, sole, of sound mind, or within the realm of England, and not under any other legal disability."

Agreements or deeds of reference, awards and maps, to be deposited in registry of archbishop, bishop, &c.

Sect. 4. "That immediately after the execution by the parties of the instrument shewing their approbation of any award to be made by virtue of this act, the agreement of reference or deed of submission, and also the award or awards and map or maps, authorised to be made by this act, and a copy of the minutes of evidence whereupon the same is made, shall be deposited, in the case of any reference by any archbishop or bishop, in the office of their own registrar; and in case of any reference by any dean, dean and chapter, archdeacon, prebendary, canon, and other dignitary and officer of a cathedral or collegiate church or chapel, in the office of the registrar of the dean and chapter thereof; and in case of any reference by any masters or other heads, or by any fellows and scholars, or other societies hereinbefore named, in the office of the steward or other proper officer of their said colleges and halls;

Documents to be produced for inspection.

and every such registrar, steward, or other officer, or some person or persons on his behalf, shall produce the documents and papers so deposited with him, or any of them, at all proper and usual hours of business, to every person interested in the subject matter of such award, or to his or her agent duly authorised, who shall make application to inspect the same, or any of them, and shall furnish a copy or copies of the same or any of them to every such person or agent who shall make

Registrar's fees.

application for such copy or copies; and every such registrar, steward,

made between the said Dean and Chapter of ——, of the one part; and the said [*lessee*], of the other part; for the

33. AGREEMENT TO SETTLE DISPUTED BOUNDARIES OF CHURCH LANDS.

or other officer, shall in every case be entitled to the sum of five shillings and no more for receiving and preserving the agreement of reference or deed of submission, award or awards, map or maps, and copy of the minutes of evidence as aforesaid; and the sum of one shilling and no more for every production of the same, or any of them, to be inspected; and the sum of sixpence and no more for every folio containing seventy-two words of every copy; and the sum of ten shillings and no more for every copy of a map so made as aforesaid."

Recital of lease by Dean and Chapter;

Sect. 5. "That the expenses attending every reference which shall be made under the authority of this act, and all the proceedings hereby required relating to the same, shall be paid and borne by the parties thereto in such manner, shares, and proportions as they shall agree; and in case the said parties shall not make any agreement relating to such expenses, then all such expenses, or so much thereof as shall not be provided for by such agreement, shall be paid and borne by the said parties in equal moieties."

Expenses of reference, how to be paid.

Sect. 6. Act to extend only to England and Wales.]

[The jurisdiction of equity in granting commissions to ascertain boundaries, which in its origin was exercised only on consent of both parties, is not very well defined: it is agreed that there must be some equitable ground for the relief beyond the mere fact that the boundaries are confused; but it is not easy to collect from the cases any general principle by which to ascertain what are or not sufficient grounds for equitable interference. In *Wake* v. *Conyers*, 1 Eden, 331, (where the learned reporter has collected all the older cases), *S. C.* 2 Cox, 360, the bill was filed to ascertain the boundary of two manors which lay in the midst of a freehold estate belonging to the defendant, who was also lord of one of the manors, and who, the bill alleged, had cut down trees in his part which indicated the boundary. Lord Keeper *Henley*, in dismissing the bill, observed that there was no precedent of fixing boundaries of an incorporeal inheritance, and that these writs were far from deserving encouragement. All the cases have been where the soil itself was in question, or where there might have been a multiplicity of writs. The Court has no power to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties; as some particular circumstance of fraud or confusion, where one party has ploughed too near the other, or the like. See *Metcalfe* v. *Beckwith*, 2 P. Wms. 376.]

Jurisdiction of equity to settle boundaries.

Boundaries of a manor.

Jurisdiction must be founded on some equity arising from the defendant's acts.

[In *Atkins* v. *Hatton*, 2 Anstr. 386, a bill by the rector of a parish seeking an account of tithes and a commission to settle the boundaries of the parish and the glebe, was dismissed; the Court observing, that the presumption that all the lands which should be found within the parish would be titheable to the plaintiff was by no means conclusive, and there was no instance of a commission being granted in order to obtain a remote consequential advantage.]

Boundaries of a parish.

[In the case of *St. Luke's, Old Street*, v. *St. Leonard's, Shoreditch*,

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considerations therein mentioned, the said Dean and Chapter did demise and lease unto the said [*lessee*], *All* (*transcribe*

Boundaries.

1 Br. C. C. 40; *S. C.* nom. *Ware* v. *Hotham*, 2 Dick. 550, cit. 2 Anstr. 395, an issue was asked to settle the boundaries of two parishes; but Lord *Thurlow*, C., said that if he should direct an issue in such a case as this, he did not see what case would be peculiar to a court of law. Where there was a common right to be tried, such a proceeding was to be understood. That was the case where the tenants of a manor claim a right of common by custom, because the right of all the tenants of the manor is tried by trying the right of one; but in this case he saw no common right which the parishioners had in the boundaries of the parish. It would be to try the boundaries of all the parishes in the kingdom on account of the poor laws. *He apprehended these issues had been usually directed by consent of the parties.*]

Confusion of boundaries caused by tenant.

[In *Speer* v. *Crawter*, 2 Mer. 410; 17 Ves. 216, a bill to settle boundaries was brought by the lord of the manor of W. against the lord of the adjoining manor of J. (who was lessee of the manor of W.), and against commissioners under an inclosure act, alleging confusion of boundaries, arising out of the unity of possession; and that the defendants were preparing, by combination together, to set out a boundary of the manor of J., which would include lands belonging to W. The defendant, by his answer, set out boundaries, referring to perambulations made previously to the union of possession; and the lease having expired since the filing of the bill, and there being no proof that any confusion of boundaries had been occasioned by the default of the lessees of W., the bill was dismissed by Sir *W. Grant*, M. R., who said—"There are two writs in the Register concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction by the Court of Chancery, took its commencement. The first is the writ *de rationalibus divisis;* the other the writ *de perambulatione faciendâ*. Both Lord *Northington* and Lord *Thurlow*, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion, that consent was the ground on which it had been at first exercised. The next step would probably be to grant the commission on the application of one party, who shewed an equitable ground for obtaining it; such as that a tenant or copyholder had destroyed or not preserved the boundaries between his own property and that of his lessor or lord: and to its exercise on such an equitable ground, no objection has ever been made. But on what principle can a Court of Equity interfere between two independent proprietors, and force one of them to have his rights tried and decided in any other than the ordinary legal mode in which questions of property are to be decided? In some cases certainly the Cour thas granted commissions or directed issues, on no other apparent grounds than that the boundaries of manors were in controversy*. In *Wake* v. *Conyers*, 2 Cox, 36, however, Lord *Northing-*

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* [See *Lethieullier* v. *Lord Castlemain*, 1 Dick. 46; Sel. Ch. Cas. 60; 2 Eq. Ab. 161.]

the description of parcels from the lease), To hold the same unto the said [*lessee*], his executors, administrators, and assigns,

33. AGREEMENT TO SETTLE DISPUTED BOUNDARIES. OF CHURCH LANDS.

Boundaries.

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ton held that it was in the case of manors that the exercise of the jurisdiction, which he says had been assumed of late, was peculiarly objectionable. He refused either to grant a commission, or to direct an issue. So did Lord *Thurlow* in the case of two parishes. In the same case of *Wake* v. *Conyers*, Lord *Northington* says, that in his apprehension this Court has simply no jurisdiction to settle the boundaries even of land unless some equity be superinduced by act of the parties. I concur in that opinion, and think that the circumstance of a confusion of boundaries furnishes *per se* no ground for the interposition of the Court."]

["The present bill in point of statement laid a sufficient ground for such interposition, for it alleged the confusion to have taken place by the fault or the neglect of the owners of J. while lessees of W. But that is not only not made out, but disproved. If the ancient boundaries of the two manors be really unknown, as the plaintiff alleges they are, how are commissioners to ascertain them, or what is to be done if they cannot be ascertained? When it is through the default of a tenant or copyholder that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out as shall be equal to the quantity originally granted or leased*. But because the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency made good out of his neighbour's estate."]

Distress prevented by confusion of boundaries.

[If the owner of lands subject to a rent or service confuse the boundaries so as to prevent a distress, the owner of the rent or service may have a commission. 1 Ch. Cas. 145; 1 Br. C. C. 201; 1 Ves. sen. 172: *Duke of Leeds* v. *Earl Strafford*, 4 Ves. 180.]

[Where a confusion has been caused by the conduct of the tenant, the jurisdiction will be exercised, although no fraud appears to have been intended. *Att.-Gen.* v. *Fullerton*, 2 Ves. & B. 263. See *Loker* v. *Rolle*, 3 Ves. 4: *Ashton* v. *Lord Exeter*, 6 Ves. 290: *Grierson* v. *Eyre*, 9 Ves. 341.]

There must be some ground in equity against the *defendant* to warrant the Court's interference.

[Where a lessee during his possession had allowed the boundaries between his own property and that which he held by demise to become confused, a bill for a commission filed by him after his lease had expired, against an assignee of the lessor, who had obtained possession of both properties, but not, it appeared, improperly, was dismissed by Sir *T. Plumer*, M. R., who said that the Court would not interfere between independent proprietors; but there must be shewn some misconduct on the part of the defendant or those under whom he claims, which renders it incumbent on him to co-operate in re-establishing the boundaries. *Miller* v. *Warmington*, 1 Jac. & W. 472.]

Godfrey v. *Littel.*

[Where the defendant and his ancestors had from the time of Hen. VIII. been lessees under Queen's College, Cambridge, of a field which

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* [See *Pickering* v. *Kempton*, Toth. 39, and cases cited, 1 Eden, 337, n.]

33. AGREEMENT TO SETTLE DISPUTED BOUNDARIES OF CHURCH LANDS.

from the feast of the Nativity of St. John the Baptist, then last past, unto the full end and term of eighteen years thence next ensuing, at and under the rents, and subject to the covenants and conditions, therein mentioned. AND WHEREAS by indentures of lease and release the release bearing date the —— day of ——, and made &c., *All* (*transcribe the freehold parcels so far as is material*), with the appurtenances, were released or otherwise assured unto and to the use of the said [*wife*], her heirs and assigns, for ever. AND WHEREAS the last-mentioned freehold hereditaments do abut upon and adjoin the hereditaments so as aforesaid comprised in and demised by the above-recited indenture of demise, in a line extending in direction from ——, south-westwards, to ——, (*describe the boundary so far as it is ascertained*), but the exact limit and boundary between the hereditaments comprised in the above-recited indentures of lease and release, and the hereditaments comprised in the above-recited indenture of demise, is not certainly known as to so much of the said limit and boundary as is between —— and —— (*state the extremities of the disputed boundary*), which uncertain or unknown part of the said limit or boundary is left uncoloured in the map or plan of the said hereditaments, drawn in the margin of these presents, the ascertained and known parts of such limit or boundary being in the same map or

Of conveyance in fee to wife;

—that the estates are adjoining;

—that the boundaries are not known in some parts.

Reference to map.

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in the leases had been uniformly described as containing by estimation sixty acres, and on the expiration of the last lease the defendant delivered up only forty acres, alleging that the customary estimated acre contained only three roods, and claiming certain adjoining property which had been fenced within the last sixty years as his own; the Court, being satisfied that some part of the College land had been retained by the defendant, directed a commission to settle the boundaries, or a compensation, although the defendant strongly contended for an issue. On that question the Court said, that the Court would be guided by the circumstances of the case: if the question is merely whether certain specified land belongs to A. or to B., an issue is fittest; but when the limits in dispute are not ascertained on both sides respectively, and a question of compensation may arise, a commission will be most proper. *Godfrey* v. *Littel*, 1 Russ. & M. 59; affirmed on appeal, 2 Russ. & M. 630. As to the form of the decree for a commission, see *Duke of Leeds* v. *Earl Strafford*, 4 Ves. 186: *Willis* v. *Parkinson*, 2 Meriv. 509.]

Discretion of the Court in granting an issue or a commission.

Evidence at law.

[As to the evidence of boundaries in a trial at law, see *Bridgeman* v. *Jennings*, Lord Raym. 734: *Thomas* v. *Jenkins*, 1 Nev. & P. 587: *Taylor* v. *Devey*, 2 Id. 469: *Briscoe* v. *Lomax*, 3 Id. 308: *Evans* v. *Rees*, 2 Per. & D. 626.]

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plan indicated by a blue line. And whereas it has been agreed between the said parties hereto, that the settlement of such uncertain or unknown limit or boundary shall be referred to the adjudication of [*referee*], of &c., under or by virtue and in pursuance of the provisions of an act passed in the second and third years of the reign of King William the Fourth, intituled, "An act to authorise the identifying of Lands and other Possessions of certain Ecclesiastical and Collegiate Corporations." NOW THIS INDENTURE WITNESSETH, that the said parties hereto (*c*) do severally and respectively declare and agree, that the final settlement of the uncertain or unknown limit or boundary shall be, and is hereby referred to the adjudication of [*referee*]: And that the said [*referee*] shall be and is hereby fully authorised to make, or cause to be made, such surveys, maps and admeasurements of the hereditaments hereinbefore mentioned or referred to, or of any of them, or of any part thereof respectively; *And* to summon such persons as witnesses, and examine them on oath, touching or concerning the matter hereby referred, or in any way relating thereto; *And* to call for the production of all such surveys, maps, deeds, books, papers, and writings, in the custody or power of any of the parties hereto, or of any other person or persons, of or concerning the matter hereby referred, as the said [*referee*] shall, in his discretion, think fit. AND FURTHER, that the said [*referee*] having well and sufficiently investigated and considered the same, and all matters hereby to him referred, shall and may make his award in writing, under his hand and seal, with a map drawn thereupon, or thereunto annexed: Which award and map shall be upon parchment or vellum, and shall award and determine, identify, delineate, and describe the boundaries, quantities, particulars, and situations of the said hereditaments so referred to him as aforesaid: *And* which award and map shall be laid before all the parties hereto, and upon the approbation

Agreement to refer settlement of boundaries.

Testatum.

Parties agree that settlement of boundaries shall be referred to A. B.

Power to make surveys;

—to examine witnesses;

—to call for deeds, &c.

Award and map to be made.

Approbation of parties to make award and map

(*c*) [If the consent of any spiritual superior is requisite, (see 2 & 3 Will. 4, c. 80, s. 2), add,

"By and with the consent of ——, testified by his [their] executing these presents."]

Consent.

[The approbation of the award in such case must also be executed by such consenting party. Ib.]

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of each of the parties hereto being written upon the same award and sealed with the seal of the said dean and chapter, and signed (*d*) and sealed by each of the other parties hereto, the same award and map shall be for ever afterwards binding upon each and all of the parties hereto, and their several and respective successors, heirs, executors, administrators, and assigns, and final and conclusive as to all matters therein or thereby respectively contained or referred to. [AND IT IS LASTLY HEREBY AGREED that the expenses attending the preparation and execution of these presents, and the proceedings for carrying the reference hereby made into effect or relating thereto, shall be equally divided and paid and borne among and by the said parties hereto respectively (*e*), or their respective successors, executors, administrators, or assigns.] IN WITNESS whereof the said dean and chapter have set their common seal, and the said other parties hereto have severally set their hands and seals the day and year first above written. DATED in the chapter-house of the said dean and chapter, the day and year first above written. [*Seal.*]]

binding and conclusive.

Costs to be borne equally.

(*d*) [The act requires the approbation to be *signed* and sealed by all parties, but, in the case of a Dean and Chapter, the affixing of the corporate seal is the only signature that can be made.]

(*e*) [If there is a consenting party of the fourth part, say, "of the first, second, and third parts respectively."]

34. PARTITION OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

34. AGREEMENT *for a* PARTITION *of* FREEHOLD, COPYHOLD, *or* LEASEHOLD *Premises in* POSSESSION, REMAINDER, *or* REVERSION; *where the Part which each is to take in Severalty has been previously ascertained; and it is referred to* COMMISSIONERS, *or their Umpire, to determine the Sum to be paid for Equality of Partition.* (*The most simple form* (*a*)).

ARTICLES OF AGREEMENT indented and made, the —— day of ——, 18—, BETWEEN [*first party*],

Parties.

(*a*) As to agreements for partition, *vide infra*, Vol. 6, p. 586.

of &c., of the one part; and [*second party*], of &c. of the other part.

34. PARTITION OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

Recital of seisin in possession.

WHEREAS (*b*) the said [*first party*] and [*second party*], are seised of or entitled to the fee-simple (*c*), in joint tenancy, [*or* in common, *or* in coparcenary] (*d*), in possession

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(*b*) If the premises be leasehold, say,

LEASEHOLD.

"WHEREAS by indenture, bearing date on or about the —— day of ——, 18—, and made between [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part; the said [*lessor*] demised and leased unto the said [*lessee*], his executors, administrators and assigns, *All those* two messuages and gardens, situate at ——, in the county of ——, with the appurtenances, for the term of —— years, commencing from the —— day of ——, 18—, subject to the yearly rent of £——, and to the several covenants and agreements therein contained. AND WHEREAS the said [*lessee*] died intestate in or about the year 18—, and administration of all and singular the goods, chattels, and credits of the said [*lessee*] was granted to [*wife*], the wife of the said [*first party*], by her then name of [*maiden name*], by the Prerogative Court of the Archbishop of Canterbury, on or about the —— day of ——, 18—. AND WHEREAS the said [*wife*], the wife of the said [*first party*], and the said [*second party*], are the only children and next of kin of the said [*lessee*]; and as such the said [*first party*], in right of his said wife, and the said [*second party*], in his (*or* her) own right, are possessed of, or entitled to, the said messuages and gardens, with the appurtenances, for the remainder of the said term."

Recital of lease.

Intestacy of lessee, and grant of administration.

Of parties being entitled as next of kin of lessee.

(*c*) If the premises be copyhold, say,

COPYHOLD.

"according to the custom of the manor of ——, in the county of——, in joint tenancy, &c."

(*d*) If in remainder or reversion, say,

REMAINDER OR REVERSION,

"in remainder or reversion, expectant immediately upon the decease of ——, of &c., (*or* the end or other sooner determination of an indenture of lease, bearing date on or about the —— day of ——, 18—, for —— years* from

on estate for life, or years,

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* If for years determinable on lives, say,

if [*nominees*], of &c., (any) or either of them should so long live, granted, &c."

or for years determinable on lives.

34. PARTITION OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

Parcels.

Recital of agreement for partition.

Testatum.

Part of premises to belong to one party, and part to the other.

Referees to determine equality of partition.

of *All those* two closes or parcels of land, situate at ——, in the county of ——, in the occupation of ——; *And also* all that messuage, or tenement and garden, situate at —— aforesaid in the occupation of ——. AND WHEREAS the said [*first party*] and [*second party*] have mutually agreed to effectuate a partition of the said lands and hereditaments, upon the terms and in the manner hereinafter mentioned. NOW THESE PRESENTS WITNESS, that the said [*first party*] doth hereby for himself, his heirs, executors, and administrators, agree with the said [*second party*], his heirs and assigns; *and* the said [*second party*] doth hereby for himself, his heirs, executors, and administrators, agree with the said [*first party*], his heirs and assigns, in manner following; that is to say (*e*), THAT the said two closes or parcels of lands shall hereafter belong to, and become the sole property of, the said [*first party*], his heirs and assigns (*f*); AND that the said messuage or tenement, and garden, shall hereafter belong to, and become the sole property of, the said [*second party*], his heirs and assigns (*f*); AND that it shall be referred to ——, of &c., a referee nominated by and on the behalf of the said [*first party*], and ——, of &c., a referee nominated by and on the behalf of

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LEASEHOLD.

(*e*) "that each of the said parties doth hereby for himself, his heirs, executors, and administrators, agree with the other of them, his executors, administrators, and assigns, in manner following; that is to say, THAT the messuage and garden, now in the occupation of ——, shall hereafter belong to, and become the sole property of, the said [*first party*], his executors, administrators, and assigns, for the remainder of the said term; *And* that the messuage and garden, now in the occupation of ——, shall hereafter belong to, and become the sole property of the said [*second party*], his executors, administrators, and assigns, for the remainder of the said term."

REMAINDER OR REVERSION.

(*f*) "subject to the said estate for life (*or* years) of the said ——"

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the —— day of ——, 18—, granted by [*lessor*], of &c. (their late father, deceased) to [*lessee*], of &c., of and in ALL &c."

the said [*second party*], to decide and determine (*g*), whether any, and what sum of money, shall be paid, for equality of partition; and whether by a yearly payment, with a power of distress and entry, or by the payment of a sum in gross: and by which of the said parties, and at what time, such money shall be paid (*h*); AND if the said referees should not agree in their determination, within the space of —— calendar months from the date hereof, Then the same shall be referred to such one person as the said two referees shall, within the space of —— calendar months from the date thereof, for that purpose appoint to be umpire, who shall decide and determine the same within —— calendar months next after he shall be appointed umpire. AND that when it shall have been determined whether any and what sum of money shall be paid for equality of partition, and in what manner, and by which of the said parties such money shall be paid (*i*), *Then* the said parties respectively, and their respective heirs and assigns, shall, with all convenient speed (*k*),

34. PARTITION OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

Umpire, in default of referees, to determine equality of partition.

Parties to execute mutual conveyances.

(*g*) "which of the said parties shall hereafter, during the said term, pay the yearly rent of £——, reserved and made payable by the said indenture of lease, or otherwise in what proportion they shall pay the same; and whether there shall be inserted in the conveyances and assignments hereinafter agreed to be made, cross covenants for payment of the apportioned rent, and cross powers of distress and entry on the non-payment of the same, by the said parties respectively, or their respective executors, administrators, or assigns, in order that the said parties respectively, and their respective executors, administrators, and assigns, may be reimbursed all costs, charges, and expenses, which he or they shall incur, sustain, disburse, or expend, for, or by reason or means of the non-payment of the rent to be paid by the other of the said parties, his executors, administrators, and assigns, and"

Referees, or umpire, to determine which party shall pay rent, or in what proportions; and whether cross powers of distress shall be inserted in assignments.

(*h*) "and to which of the said parties, or in what proportion, the yearly rent, reserved by the said indenture of lease, shall be paid during the continuance of the term thereby granted;"

REVERSION.

(*i*) "and which of the said parties shall be entitled to the said yearly rent, or in what proportions,"

(*k*) "with the license and consent of the lord or lords, lady

COPYHOLD.

34. PARTITION OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

make, do, and execute, all such acts, deeds, conveyances, or assurances, as the counsel of the said parties respectively, or their respective heirs or assigns, shall advise, or require, for the purpose of conveying and assuring the hereditaments and premises hereby agreed to be held in severalty, unto the other of them the said parties, his heirs and assigns, or to such uses, and in such manner, as he or they shall direct or appoint: [AND that the said referees, or their umpire, shall be, and they and he are hereby authorised, (if they or he should think fit), to make a survey of the lands and hereditaments, and cause a map or plan to be drawn thereof]; AND the costs, charges, and expenses of the respective conveyances of the premises to be taken in severalty as aforesaid, shall be paid and borne by the party to whom the same shall be made; *But* that the costs, charges, and expenses of preparing, engrossing, and executing this present agreement, [and a duplicate hereof], or in anywise relating thereto, [and of making such survey, and of such map as aforesaid], and all other costs, charges, and expenses of the said referees, or their umpire, and all other costs, charges, and expenses incurred, or to be incurred, in or about the partition hereby agreed to be made, or in anywise relating thereto, shall be paid and borne by the said parties hereto, and their respective heirs, executors, administrators, and assigns, in equal proportions: AND LASTLY, that the said referees, or their umpire, shall decide to which of the said parties the custody of the several title-deeds relating to the said lands and hereditaments, shall respectively belong: *And* by which of them, and in what proportions, the expenses of any attested copies, or covenants for production of deeds, which the said arbitrators, or their umpire, may

Power to referees, or umpire, to make survey, &c.

Each party to pay for his own conveyance.

But other costs and charges to be borne equally.

Referees, or umpire, to decide who shall have title-deeds, and who shall pay for attested copies, &c.

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or ladies, of the manor or manors, of which the same are holden*, make, do, and execute, all such acts, deeds, conveyances, surrenders, or assurances, as the counsel of the said parties respectively, or their respective heirs or assigns, shall advise or require, for the purpose of conveying, surrendering, and assuring the said, &c."

* It seems that a partition cannot be perfected without the license, or subsequent consent, of the Lord: such as admitting them tenants to the respective parts in severalty. Hale's MS., Hargr. n. Co. Litt. 59. a. (1). *Vide infra*, Vol. 6, p. 598.

deem necessary, shall be borne. In witness whereof, the parties above named have hereto, [and to a duplicate hereof], set their hands and seals, the day and year first above written.

34. PARTITION OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

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35. AGREEMENT *for a* Partition *by* Commissioners, *of* Freehold *and* Copyhold *Premises between two* Co-heiresses *and their* Husbands, *and the* Trustees *of a* Settlement *of the Share of one;* And *that certain Parts of the Property shall be taken as Part of each Allotment.*

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Articles of agreement indented, had, made, concluded, and agreed upon, the —— day of ——, in the year of our Lord, 18—; Between [A.], of &c., and [B.], his wife, of the first part; [*two trustees*], of &c., of the second part; [D.] of &c., and [E.] his wife, of the third part.

Parties.

WHEREAS, [*father*], of &c., died intestate, on or about the —— day of ——, in the year 18—, seised of, or well and sufficiently entitled to, the fee-simple of the freehold and copyhold lands and hereditaments hereinafter described, and hereby agreed to be divided and partitioned in severalty, and which thereupon descended and came to the said [B.] and [E.] as his only children, and heirs-at-law. And whereas by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, in the year 18—, and made, or expressed to be made, between the said [B.], by her then name and description of [*maiden name*], of the first part, the said [A.], of the second part, and [*trustee*], of &c., of the third part; being a settlement made previously to and on the marriage of the said [A.] and [B.], and which was afterwards duly solemnized, and took effect: the moiety or equal half part of the said [B.], of and in the said lands and hereditaments, was conveyed and covenanted to be surrendered to the said [*trustee*] and his heirs: As to the said freehold lands and hereditaments, *To the use*

Recital of intestacy, and seisin of father.

Descent to his daughters.

Settlement of one moiety.

To such uses as

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of, And as to the said copyhold (*a*) lands and hereditaments, *In trust* for such person or persons, and for such ends, intents,

husband and wife should jointly appoint.

Copyholds are not within the statute.

As to future or springing uses of copyholds.

(*a*) The statute of uses does not extend to *copyholds*, because the transmutation of possession by the sole operation of the statute, without the consent or allowance of the lord, or the agreement of the tenant, would tend to the prejudice both of the lord and of the tenant: Co. Cop. s. 54; Tr. 124; Wms. n. 2 Saund. 12 : and this is plain from common experience; for, when a copyholder surrenders to the use of another the possession is not executed to the use; as the estate remains in the surrenderor, and surrenderee has nothing until admittance but an equitable estate: Gilb. Ten. 182; 1 Sand. Uses, 203, 3rd edit., 195, 2nd edit.; 1 Cru. Dig. 418, 2nd edit.; Cru. Uses, 55; Sug. Gilb. Uses, 72: and therefore a surrender of copyhold lands to uses is not to be considered on the foot of a use or trust; for, as copyholds are not within the statute of uses, such surrender is only a direction to the lord whom to admit; and when admitted, the surrenderee is in by the grant of the lord, not of the surrenderor; so that it is of a particular nature, and not as a use or trust on the statute; Per Lord *Hardwicke*, 2 Ves. 257; 1 Watk. Cop. [100] [185]; 2 Ibid. [193]: and therefore the construction of the surrender of copyholds must be the same as if the estates had been limited by feoffment, or any other deed deriving its effect purely from the principles of the common law, without the intervention of the statute of uses, and must be alike governed by the same rules of the common law. Per *Holt*, C. J., 1 P. Wms. 76. And therefore it should of consequence follow, that springing uses, or uses to arise in future, cannot be created by surrender. Gilb. Ten. 260-1, Watk. n.; 5 Bac. Abr. 779. Mr. Watkins says, that a fee cannot be limited on a fee by a common law conveyance, is not necesary to be proved; it is acknowledged. And surely if a surrender of copyhold lands is to be construed as a common law conveyance, it must follow, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender; for, if a fee *can* be limited on a fee by a surrender, then the surrender *cannot* be construed as a conveyance at common law. And on the same principle, if an estate for life, or of inheritance, cannot be created to commence *in futuro* by a common law conveyance, and a surrender of copyholds ought to be construed as such conveyance at common law ought to be construed, then an estate for life, or of inheritance, cannot be created to commence *in futuro* by a surrender of copyholds. If we acknowledge the premises, we must not deny the conclusion. 1 Watk. Cop. [208]; Sug. n. Gilb. Uses, 353. The learned Mr. Sanders, however, is not satisfied with this reasoning, in the shape of a syllogism; he says, *syllogismus assensum constringit, non res:* and endeavours to shew, that the use limited on an *immediate* surrender has no resemblance to a feoffment at the common law before the introduction of uses; but that it closely corresponds with the use, in its fiduciary state, on a feoffment; Sanders on Surrenders of Copyholds, page 7; and, after observing that there can be no doubt that, by means of *uses* limited on feoffments, or other common law conveyances, a freehold may be created to commence *in futuro*, without a previous par-

and purposes, as the said [A.] and [B.] should at any time, and from time to time, by any deed or writing under their

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ticular estate to support it, and that a fee may be limited upon a fee, or that pre-existing uses, commensurate to the fee-simple, may be defeated by contingent, springing, and executory uses; and that the question to be considered is, whether, in these instances, uses on a surrender correspond with uses on feoffments, or other common law conveyances; he proceeds to shew, that the resemblance between them is not destroyed or opposed by any *direct decision;* and that, consequently, there will be no material difficulty in establishing the analogy between them by authority, as well as principle; page 20; and he comes to the conclusion, that the authorities in favour of the limitation of a *future* use, on an immediate surrender of a copyhold, appears satisfactory; page 36; and that springing, contingent, and executory uses, may be limited upon a surrender, defeating, by their operation, uses previously existing by limitation and admittance; page 43; from whence he assumes, that powers of revocation and appointment are applicable to settlements of copyhold estates because a use, arising under the exercise of a power, is a springing use; page 57. Considerable reliance is placed on forms of deeds in Lex Customaria, Jacob's Court Keeper, the English Copyholder, and Horseman's Conveyancing; but the errors of these books can be of no authority when the principle they would establish is contrary to reason; and besides, there are other forms in all these books, which would equally countenance the contrary doctrine. The learned gentleman also says, page 47, "Kitchen (170, edit. 1657), one of the oldest writers on copyholds, says, 'use may be of copyhold, as well as of freeholds.'" But the words which immediately succeed in Kitchen are omitted, viz. "but the statute of 27 Hen. 8, for uniting the possession to the use, doth not extend to such tenures: nor (he to whose use) cannot forfeit the land by cutting trees, if it were not by the consent and commandment of the *copyholder*." Kitchen on Courts, 172, edit. 1663. Mr. Fearne appears to have been of the same opinion as Mr. Sanders: Contingent Remainders, 201, 3rd edit., 417, 4th edit., 276, Butl. edit. See 5 Cru. Dig. 590, s. 98, 2nd edit.

Springing uses of copyholds.

Since writing the above note, Mr. Scriven has entered largely into a confutation of Mr. Sanders's Treatise on Surrenders of Copyholds. Scriven on Copyholds, pp. 185, 207, &c., 2nd ed., 196, 202, 210, &c., 3rd ed. [J.See also, 1 Watk. Cop. by Coventry, 263. But the case of *Boddington* v. *Abernethy*, 8 Dowl. & Ryl. 626, 5 B. & Cr. 776, establishing that a power of revocation and new appointment may be reserved of copyholds, will probably be considered by the learned reader as favouring Mr. Sanders's view of the question.J.]

[J.In that case the point was, whether uses could be limited of a copyhold estate in execution of a power of revocation and new appointment. The facts were, that A., seised in fee of freeholds and in tail of copyholds, on her marriage conveyed the freeholds to the use of the intended husband for life, with remainders over; the deed containing power to the trustees to sell, and for that purpose to revoke the uses and appoint the lands to a purchaser; and A. covenanted to sur-

Copyholds may be limited to new uses under a power of revocation and new appointment.

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hands and seals, sealed and delivered by them in the presence of two or more credible witnesses, jointly appoint: *And* in default of such joint appointment, to the use of such person or persons as the said [B.], in and by her last will and testament, in writing, or any writing in the nature of her last will and testament, to be signed and sealed by her in the presence of, and attested by, two or more credible witnesses, and whether sole or covert, should solely appoint; *And* in default of such appointment, or so far as the same should not extend, *To the use* of, and *In trust* for the said [A.], his heirs and assigns, in case he should survive his said wife. AND WHEREAS by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, in the year 18—, the release made between the said [E.], by her then name and description of [*maiden name*], of the first part, the said [D.], of the second part, and the said [*trustees*], of the third part; (being a settlement previously to the marriage of the said [D.] and [E.], and which was afterwards duly solemnized); the moiety or equal half part of the said [E.] of and in the said lands

In default, as wife alone should by will appoint.

In default, to husband in fee, if the survivor.

Settlement of the other moiety.

Power to appoint copyholds.

render and suffer a recovery of the copyholds to the same uses; this surrender and recovery were duly perfected, the demandant in the recovery being admitted, and surrendering to the uses of the settlement. In execution of the power of sale in the settlement, the trustees sold the copyhold lands to the plaintiff in fee; and by virtue of the power of revocation they *revoked the uses to which the copyholds had been surrendered, and limited and appointed them to the use of the purchaser in fee;* and B. covenanted for himself and his wife to surrender the copyholds to the purchaser in fee. B. then surrendered them to the use of the trustees in fee, upon the trusts of the settlement; the trustees were admitted, and afterwards surrendered to the use of the plaintiff, the purchaser, in fee, who was admitted accordingly. The question on a case from Chancery was, whether the plaintiff had an estate in fee-simple at the will of the lord, according to the custom of the manor, in the premises; and the Court, after an elaborate argument, certified that he had.] [See 1 Scriv. Cop. 226, 3rd ed.]

[And a power of appointment over copyholds may co-exist with an interest in them. As, where copyholds were surrendered by R. to such uses as D. should by deed appoint, and in default of, and until such appointment, to the use of D. in fee; and D. appointed that the premises should remain to the use of P., it was held that the lord was compellable to admit P.; notwithstanding D. had never been admitted, and that neither he nor R. had ever surrendered to the use of P. *Rex* v. *Lord of the Manor of Oundle*, 3 Nev. & M. 484; 1 Ad. & El. 183; *infra*, Vol. 5, p. 510.]

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and hereditaments, was conveyed, and covenanted to be surrendered to the said [*trustees*], and their heirs, to certain uses, and upon certain trusts, therein particularly mentioned: In which lastly in part recited indenture of release are contained the usual powers to the said [*trustees*], their heirs, and assigns, with the consent and approbation of the said [D.] and [E.], or the survivor of them, to be testified by some writing under their, or his, or her hands and seals, or hand and seal, to make sale, partition, or exchange of the moiety of the said lands and hereditaments therein mentioned: with power to raise money to be paid, or to invest money received for equality of partition. AND WHEREAS the said [A.] and [B.] his wife, and the said [*trustees*], with the consent of the said [D.], and [E.] his wife, testified by this writing, sealed and delivered by them in the presence of and attested by two credible witnesses, whose names are or are intended to be hereupon indorsed as witnesses to the execution of these presents by the said [D.], and [E.] his wife, have mutually agreed to make a partition of the lands and hereditaments mentioned and comprised in the schedule hereunder written, or hereunto annexed. NOW THESE PRESENTS WITNESS, that for effectuating the said partition, the said [A.], for himself, his heirs, executors, and administrators, and for the said [B.], his wife, and also the said [B.], do hereby respectively agree with the said [*trustees*], their heirs and assigns, and they the said [*trustees*], as such trustees as aforesaid, with the consent of the said [D.], and [E.] his wife, testified as aforesaid, do hereby agree with the said [A.], and [B.] his wife, in manner following; that is to say, THAT a partition or division of all and singular the said lands and other hereditaments, mentioned and comprised in the said schedule hereunder written or hereunto annexed, [*Except* three cottages &c., situate &c., and a close of land &c., situate &c.,] into two separate allotments of equal value, or as nearly so as circumstances will permit, shall be made by [*commissioners*], of &c.: AND that the said commissioners shall decide and determine, whether any, and what, sum of money shall be paid for equality of partition, and by which of the parties such money shall be so paid: [THAT the said three cottages &c. shall, upon the said partition, be taken as part of the share in severalty of the said [*trustees*], as such trustees as aforesaid; AND the said close, &c., shall be taken in severalty, by the said [A.],

to certain uses and trusts;

wit hpowers to trustees, with consent of husband and wife, or the survivor, to make sale, partition, or exchange.

Agreement to make partition.

Testatum.

Commissioners to make partition,

and decide who shall pay money for equality.

Certain premises to be allotted to each.

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and [B.] his wife, and the difference in value between the said cottages &c., and the said close &c., shall be ascertained and determined by the said commissioners, and shall be paid for equality of partition accordingly:] THAT for further enabling the said commissioners to make such allotments and division as aforesaid, it shall be lawful for them, and they are hereby authorised, to make a survey of the said estate, and to cause a map or plan to be drawn thereof: THAT if the said commissioners should differ in opinion, touching the said intended partition, or the money to be paid for equality, or touching the mode of carrying the said partition into effect, or any matter or thing relating thereto, then and in every such case, the subject-matter of every such difference of opinion shall be reduced into writing, and shall be referred to the decision of [*umpire*], or some other umpire, to be named by the said commissioners for that purpose; AND that the determination or decision of such umpire, upon the matter so to be referred to him, shall be final, binding, and conclusive upon both the said commissioners, and upon the parties hereto: THAT when the allotments and division hereinbefore agreed upon shall have been made, the said parties, shall draw lots, in such manner as the said commissioners shall appoint, for the privilege of choosing one of the allotments, into which the said estates [*Except* as aforesaid] shall have been divided: AND that when it shall have been decided in manner aforesaid, which of the said allotments shall be taken in severalty by the said [*trustees*], as such trustees as aforesaid, and whether any and what sum shall be paid for equality of partition, and by which of the said parties such money shall be paid: THEN the said [A.], and [B.] his wife, and all other necessary parties, shall, at the expense of the said [D.], and [E.] his wife, their heirs and assigns, with all convenient speed, make, do, and execute, or cause and procure to be made, done, and executed, all such acts, deeds, appointments, conveyances, surrenders, or assurances, in the law, as by the said [*trustees*], their heirs or assigns, or their or his counsel, shall be advised or required, for the purpose of vesting the said three cottages, &c., and also such of the said allotments as shall have been decided to be taken in severalty by the said [*trustees*], their heirs or assigns, with the appurtenances, in them the said [*trustees*], their heirs and assigns; *Nevertheless*, as to such part of the said lands and hereditaments as are of copyhold tenure, with the li-

The difference in value to be paid by each.

Commissioners authorised to make a survey and map.

Umpire to decide the differences of commissioners.

Parties to draw lots for the privilege of choosing.

When allotments, &c. ascertained, to execute conveyances to each other.

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cense and consent of the lord or lords, lady or ladies, of the manor or manors, of which the same are holden (*a*); and *nevertheless*, upon and for the uses, trusts, ends, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements, in and by the said indenture of settlement, of the —— day of ——, 18—, expressed and declared of and concerning the said undivided moiety, hereditaments, and premises, comprised in and conveyed, and covenanted to be surrendered, by the same indenture as aforesaid: AND the said [D.], and [E.] his wife, and all other necessary parties, shall, at the expense of the said [A.], and [B.] his wife, their executors or administrators, with all convenient speed, make, do, and execute, or cause and procure to be made, done, and executed, all such acts, deeds, appointments, conveyances, surrenders, and assurances in the law, as by the said [A.], and [B.] his wife, or the survivor of them, or his or her executors or administrators, or their, his, or her counsel, shall be advised or required, for the purpose of settling the said close, &c. and also such of the said allotments as shall have been decided to be taken in severalty by the said [A.], and [B.] his wife, with the appurtenances, *To the uses*, upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements, in and by the above in part recited indenture, of the —— day of ——, 18—, expressed and declared of and concerning the hereditaments, and premises thereby limited and settled as aforesaid; *But nevertheless*, as to such part of the said lands and hereditaments as are of copyhold tenure, with the license and consent of the lord or lords, lady or ladies, of the manor or manors of which the same are holden: THAT the costs, charges, and expenses of preparing, engrossing, and executing this present agreement, and of making such partition and division as aforesaid, and of making such survey, and such map as aforesaid, and all other costs, charges, and expenses incurred, or to be incurred, in and about the said partition and division, or in anywise relating thereto, [*Except* as hereinbefore is provided for,] shall be paid and borne by the parties to the said partition in equal proportions; (*b*) THAT

Expenses to be borne by parties equally.

Expenses of

(*a*) *Vide ante*, p. 594; *infra*, Vol. 6, p. 598.

(*b*) If the commissioners are to decide who shall have the title-deeds, *vide post*, p. 607.

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attested copies, &c. to be paid by the party requiring same.

if either of the parties to the said intended partition should require an attested copy or attested copies, of any of the title-deed or title-deeds, in the custody of the other party to the said partition, or to have a deed of covenant for the production of any such title-deed or title-deeds, then, and in such case, the expense of making such attested copy or copies, and the expenses attending the framing, engrossing, and executing of such deed of covenant, shall be paid by the party requiring the same: AND for the due execution and observance of the agreements hereinbefore contained, on the part of the said [A.], and [B.] his wife, the said [A.] doth hereby bind himself, his heirs, executors, and administrators to the said [*trustees*], their executors and administrators, in the sum of £—— (*c*): AND for the due performance and observance of the agreement hereinbefore contained on the part of the said [*trustees*], the said [D.] doth hereby bind himself, his heirs, executors, and administrators, to the said [A.], his executors and administrators, in the like sum of £——. IN WITNESS &c.

Nomine pœnæ.

Schedule.

THE SCHEDULE TO WHICH THE ABOVE-WRITTEN AGREEMENT REFERS.

(*c*) *Vide ante*, p. 436.

36. PARTITION BY ARBITRATORS.

36. AGREEMENT *to leave it to* ARBITRATORS *to make a* PARTITION, *and to* DISMISS *a* BILL *in* CHANCERY *for a Partition, where one of the Parties is seised of Seven-Eighths, and the other Party of One-Eighth, of a Manor, Farm, and Lands.*

ARTICLES OF AGREEMENT made the —— day of ——, in the year 18—; BETWEEN [*first party*], of ——, in the county of ——, of the one part; and [*second party*], of ——, in the county of ——, of the other part.

Parties.

Recital,—

WHEREAS the said [*first party*] and [*second party*] are

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seisin in undivided and unequal shares.

seised of the inheritance in fee-simple of and in the manor of ——, in the county of ——, with the rights, members, and appurtenances; *And also* of and in a capital messuage or tenement called ——, and the outhouses, buildings, barns, stables, yards, gardens, orchards, and appurtenances thereunto belonging; *And also* of and in all and singular the arable, pasture, and marsh lands, and salt marsh grounds, to the said manor, messuage, and farm belonging, or in anywise appertaining, containing by estimation —— acres, or thereabouts, situate, lying, and being in the parish of ——, in the county of ——, and now in the occupation of ——, as tenant thereof, in the shares or proportions following; that is to say, the said [*first party*] is seised of or entitled to seven undivided eighth parts or shares thereof; and the said [*second party*] is seised of or entitled to the remaining undivided one-eighth part or share thereof.

Bill in Chancery, filled to ascertain money paid for redemption of land-tax, and for a division and partition;

AND WHEREAS the said [*first party*], on or about the —— day of —— 18—, filed a bill in the High Court of Chancery, against the said [*second party*], praying, *That* an account might be taken, by and under the direction of the said court, of the price or sum paid, or of stock transferred by [*father*], deceased, the late father of the said [*first party*], for the redemption of the land-tax charged on the said estates; *And* that the value of the said stock might be ascertained, and the defendant directed to repay the plaintiff one-eighth part of the value thereof, or to transfer to the plaintiff in the books of the Governor and Company of the Bank of England, like stock to the amount of one-eighth part thereof; *And* that an account might be taken under the direction of the said court, of what was due and owing in respect of the rents and profits of the said estates; *And* that a fair and equal partition and division might be made of the said manor and estate, between the plaintiff and defendant, according to their respective rights and interests therein; *And* that a commission might issue for that purpose, with the usual directions; and that the parts and shares of the said manor and estate, which should be allotted to the plaintiff and defendant, under the said commission, might be enjoyed by them in severalty; *And* that proper conveyances thereof might be executed.

which defendant had not answered.

AND WHEREAS the said [*second party*] hath not yet put in his answer to the said bill.

All accounts between parties settled.

AND WHEREAS since the said bill was filed, the said [*second party*] hath paid to the said [*first party*] the value of one-eighth

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part of the stock invested by the said [*father*], deceased, in the purchase of the land-tax, of or upon the said lands and hereditaments; *And* the said [*first party* and *second party*] have settled all accounts between them, in respect of the rents and profits of the said manor, lands, and hereditaments, up to the —— day of —— last past; *And* the said [*first party*] and [*second party*], have agreed that the said suit in the Court of Chancery should be forthwith dismissed without costs; *And* that a fair partition should be made between them, in proportion to their respective shares, of the said lordship or manor, lands, and hereditaments, by two indifferent persons, one of whom to be chosen by the said [*first party*], and the other by the said [*second party*], and in case two such persons should not agree in their determination, then that the same partition should be made by such one person as the said two referees should for that purpose appoint; *And* the said [*first party*] and [*second party*] have also agreed, that, in making such partition, the said manor of ——, exclusive of the said messuage, farm, and lands, should be considered and taken to be of the value of £——, of lawful British money, and should be allotted by the said referees, or their umpire, as they or he should think proper, either to the said [*first party*], or to the said [*second party*], as part of his share of the whole estate. AND WHEREAS in pursuance of the said agreement, the said [*first party*] hath nominated [*arbitrator*], of ——, in the county of ——, and the said [*second party*] hath nominated [*arbitrator*], of ——, in the county of ——, referees, or arbitrators, for the purpose of making such partition as aforesaid. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, *it is hereby mutually agreed* between and by the said parties hereto, and each of them, the said [*first party*] and [*second party*], doth hereby for himself, his heirs, executors, and administrators, and so far as the covenants hereinafter contained are respectively applicable to him or them, covenant with the other of them, his heirs and assigns, in manner following; that is to say, THAT the messuage, farm, lands, and hereditaments, hereinbefore-mentioned, (exclusive of the said manor of ——), shall be forthwith valued and appraised by the said [*arbitrators*]; and in case they should not agree in their valuation within the space of two calendar months, to be computed from the date hereof, THEN the same shall be valued and appraised by such one person as the said [*arbi-*

Agreement to dismiss bill without costs, and make partition by arbitrators or umpire.

Manor to be considered of the value of £——.

Nomination of referees.

Testatum.

Premises to be valued by referees or umpire.

trators] shall, within the space of three calendar months from the date hereof, for that purpose nominate and appoint to be umpire in the premises; who shall make his valuation within two calendar months next after he shall be appointed umpire: THAT for the purpose aforesaid, it shall be lawful for the said [*arbitrators*], or their umpire, to admeasure, or cause the said lands to be admeasured, and to make, or cause to be made, a plan or map, or plans or maps, of the same messuage, farm, lands, and hereditaments, and to do and execute all such further and other acts, matters, and things, as they or he shall think necessary or proper: THAT after such valuation shall be made as aforesaid by the said [*arbitrators*], they the said [*arbitrators*] shall forthwith, within the space of —— then next after, appropriate, select, and set apart, either with or without the said manor of ——, as they shall think proper, (reckoning the value of such manor at the sum of £——, as aforesaid), so much and such part and parts of the said messuage, farm, lands, and hereditaments, as they shall think proper, and as they shall, with the said manor if included in such appropriation and selection, but if not, then without such manor, adjudge to be the full value of one-eighth part of the whole of the said manor, messuage, farm, lands, and hereditaments, as and for the specific part or share of him the said [*second party*], of and in the same manor, messuage, farm, lands, and hereditaments, and to be by him, his heirs and assigns, held in severalty, in lieu of his undivided part or share therein: THAT in case the said [*arbitrators*] should not within the said space of ——, agree in such appropriation and selection, as aforesaid, then such appropriation and selection shall be made by such one person as the said [*arbitrators*] shall within the space of ——, for that purpose appoint umpire, who shall make such appropriation and selection within —— next after he shall be appointed umpire as aforesaid: THAT the residue of the said messuage, farm, lands, and hereditaments, not appropriated and selected as and for the specific part or share of the said [*second party*] as aforesaid, together with the said manor, if not included in such appropriation and selection as aforesaid, shall be taken by the said [*first party*], and be held by him, his heirs and assigns, in severalty, in lieu of his undivided parts or shares of and in the whole of the said manor, messuage, farm, lands, and hereditaments: THAT the costs, charges, and expenses of preparing and executing these presents, and of making such admeasurements, plans, and maps as aforesaid, and of

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Arbitrators, or umpire, to cause premises to be measured, &c.

After valuation &c., arbitrators to set apart, with or without the manor, one-eighth part for second party.

If arbitrators should not agree, umpire to select.

Residue to be taken by first party.

The expenses of measuring, &c. to be borne in equal proportions.

36. PARTITION BY ARBITRATORS.

making such valuation, appraisement, appropriation, and division as aforesaid, and otherwise attending the aforesaid reference, shall be borne and paid by and between the said [*first party*], and [*second party*], in equal shares and proportions (*a*): THAT the said [*first party*] will and shall forthwith, at the mutual expense of himself and the said [*second party*], cause the said bill, so filed by the said [*first party*] as aforesaid, to be dismissed without costs: THAT he the said [*first party*], and all other necessary and proper parties, will and shall, at any time or times after such appropriation, selection, and division shall be made as aforesaid, upon every reasonable request of the said [*second party*], his heirs or assigns, and at his or their costs and charges, make, do, and execute, or cause and procure to be made, done, and executed, all such lawful and reasonable acts, things, deeds, devises, conveyances, and assurances in the law whatsoever, which shall be requisite or necessary, for perfectly and absolutely granting, releasing, and assuring the said undivided parts or shares of him the said [*first party*], of and in the specific part or share which shall be appropriated and selected for the said [*second party*], to be by him held in severalty as aforesaid, with the rights, members, and appurtenances, unto and to the use of the said [*second party*], his heirs and assigns, for ever, or otherwise, as he or they shall direct or appoint; as by the said [*second party*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required: AND THAT the said [*second party*], and all other necessary and proper parties, will and shall, at any time or times, after such appropriation, selection, and division shall be made as aforesaid, upon every reasonable request of the said [*first party*], his heirs or assigns, and at his or their costs and charges, make, do, and execute, or cause and procure to be made, done, and executed, all such lawful and reasonable acts, things, deeds, devises, conveyances, and assurances in the law whatsoever, which shall be requisite or necessary for

To dismiss bill in equity.

First party to execute conveyance to second party.

Second party to execute conveyance to first party.

(*a*) Where the parties are interested unequally, and the partition is made at the request of the person having the smaller share, or he is plaintiff in equity for a partition, it is but justice that the costs should be borne equally; but where the person having the smaller share is forced to make a partition, it would be more equal justice for the expenses to be paid *pro ratâ*, according to their shares. See *Hyde* v. *Hindly*, 2 Cox, 408; *et infra*, Vol. 6, p. 608.

perfectly and absolutely granting, releasing, and confirming the undivided part or share of him the said [*second party*], of and in the specific part or share which shall be appropriated and selected for the said [*first party*], to be by him held in severalty as aforesaid, with the rights, members, and appurtenances, unto and to the use of the said [*first party*], his heirs, and assigns, for ever, or otherwise, as he or they shall direct or appoint; as by the said [*first party*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required: THAT the said arbitrators, or their umpire, shall decide to which of the said parties the custody of the several title-deeds, relating to the said manor, messuage, farm, lands, and hereditaments, shall respectively belong, and by whom, and in what proportions, the expenses of any attested copies, or covenants for production of deeds, which may be necessary, shall be borne: THAT if the said [*first party's arbitrator*] should die, or refuse, or become incapable to act as arbitrator, before the whole of the premises hereby referred shall be determined by the said [*arbitrutors*], or their umpire; *Then* the said [*first party*], his heirs or assigns, shall forthwith thereafter nominate and appoint some other person to be arbitrator or referee, in the stead and place of the said [*first party's arbitrator*]; and so in like manner upon the decease or neglect, or refusal to act, of any arbitrator succeeding to the place of the said [*first party's arbitrator*]: (*Add a similar clause as to second party's arbitrator*): THAT every arbitrator so to be appointed as a substitute for the said [*first party's arbitrator*] or [*second party's arbitrator*], or any succeeding arbitrator, shall, as to such of the premises as shall not at the time of his nomination and appointment be actually determined, or referred to an umpire, have the same powers and authorities as are hereby vested in the arbitrator in or to whose place he shall come or succeed: AND LASTLY, the submission and agreement hereby made shall be made a rule of her Majesty's Court of ——, at Westminster (*a*): IN WITNESS whereof, the

36. PARTITION BY ARBITRATORS.

Commissioners or umpire to decide who shall have title-deeds.

If first party's arbitrator die before award, he to appoint another.

Same as to second party's.

New arbitrators to have same power as old arbitrators.

Submission to be made a rule of Court.

(*a*) [Where it is considered probable that any difficulty will be experienced in compelling a party to execute conveyances pursuant to the award, the expedient is sometimes adopted of conveying the entirety of the lands in the first instance to the arbitrators, upon trust to convey to the several parties the portions which shall be respectively awarded to them. *Vide infra*, Vol. 6, p. 586.]

Lands sometimes conveyed to the arbitrators to be conveyed in allotments to parties.

36. PARTITION BY ARBITRATORS.

said parties have hereto set their hands and seals, the day and year first above written.

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37. PARTITION BY ONE COMMISSIONER AND ACT OF PARLIAMENT.

37. AGREEMENT *for a* PARTITION *by one Commissioner where one of the Parties is seised subject to* CONTINGENT REMAINDERS, *which makes it necessary to procure a* PRIVATE ACT OF PARLIAMENT; AND *that a Close of Land, of which the Parties are seised in common, to Uses to prevent Dower on a joint Purchase, shall go with the Allotment which shall include a Dwelling-House adjoining, at the Price of Half of the Money paid for the Close.*

ARTICLES OF AGREEMENT made the —— day of ——, 18—, BETWEEN [*first party*], of &c., of the one part; and [*second party*], of &c., of the other part.

Parties.

Recital of a devise of a moiety of the premises.

WHEREAS [*testator*], late of ——, in the county of ——, esquire, deceased, being seised to him and his heirs in fee-simple, of an undivided moiety of and in the messuages, tenements, lands, and hereditaments, mentioned or comprised in the schedule hereunder written, by his last will and testament in writing, bearing date on or about the —— day of ——, 18—, [and duly executed and attested for the devise of freehold lands of inheritance; and] after the decease of the said [*testator*], and on or about the —— day of ——, 18—, duly proved in the Prerogative Court of the Archbishop of Canterbury, gave and devised the said undivided moiety of and in the said messuages, tenements, lands, and hereditaments, unto [*eldest son*], his eldest son, for the term of his life, without impeachment of waste; *And* from and after the decease of the said [*eldest son*], unto his first and every other son, severally and successively, according to their respective seniorities, in tail male; *And* in default of such issue, unto his the testator's second son, the said [*first party*], and his assigns for his life, without impeachment of waste; *And* from and after the decease of the said [*first party*], unto his first and every other son, severally and successively, according to their seniorities, in tail male: *And* in default of such

To eldest son for life.

Remainder to his first and other sons in tail male.

Remainder to first party for life.

Remainder to his first and other sons in tail male.

Remainder to

37. PARTITION BY ONE COMMISSIONER AND ACT OF PARLIAMENT.

issue respectively, unto his own the testator's right heirs for ever: AND the said [*testator*] afterwards, and on or about the —— day of ——, 18—, departed this life, leaving the said [*eldest son*], his eldest son and heir-at-law: AND WHEREAS by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—, the indenture of release being made, or expressed to be made, between the said [*eldest son*] of the first part, the said [*first party*] of the second part, and [*mortgagee*], of ——, in the county of ——, yeoman, of the other part, the said undivided moiety of and in the said messuages, tenements, lands, and hereditaments, were by the said [*eldest son*], and [*first party*], conveyed and assured unto the said [*mortgagee*], and his heirs, *To hold* the same to the said [*mortgagee*], and his heirs, *To the use* of the said [*mortgagee*], his heirs, and assigns, *But subject* nevertheless, and without prejudice, to the devises and limitations contained in the said will of the said [*testator*], to and for the benefit of the issue male of the said [*eldest son*], and the issue male of the said [*first party*] respectively; *And subject also* to a proviso or agreement for redemption on payment by the said [*eldest son*] and [*first party*], or either of them, or the heirs, executors, administrators, or assigns of them, or either of them, of the sum of [*mortgage money*], with interest for the same, at the time and in the manner in the said indenture of release mentioned: AND WHEREAS the said [*eldest son*] departed this life on or about the —— day of ——, 18—, a bachelor and intestate, and was interred in the burying-ground of the parish of ——: AND WHEREAS by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—, and made between the said [*mortgagee*] of the one part, and the said [*first party*] of the other part, the said undivided moiety of and in the said messuages, tenements, lands, and hereditaments, were conveyed and assured by the said [*mortgagee*] unto the said [*first party*] and his heirs, *To hold* the same unto and *To the use* of the said [*first party*], his heirs and assigns: *But subject* nevertheless to the devises and limitations contained in the said will of the said [*testator*], to or for the benefit of the issue male of the said [*first party*], or to such of them as were then subsisting: AND WHEREAS the said [*second party*] is seised of or entitled to the other undivided moiety of and in the said messuages, lands, tenements, and hereditaments,

testator's own right heirs.

Death of testator.

Heirship.

Lease and release, by way of mortgage, by eldest son and first party.

Subject to the devises to their respective issue male.

And subject to equity of redemption.

Death of eldest son intestate, a bachelor.

Reconveyance from mortgagee to first party.

Subject to the devises to his issue male.

Second party seised of other moiety.

37. PARTITION BY ONE COMMISSIONER AND ACT OF PARLIAMENT.

with the appurtenances, for an estate of inheritance in fee-simple: AND WHEREAS the said [*first party*] hath no issue male: AND WHEREAS the said [*first party*] and [*second party*] have mutually agreed to effectuate a partition of the aforesaid messuages, lands, tenements, and hereditaments, upon the terms and in manner hereinafter mentioned: AND WHEREAS the titles of the said [*first party*] and [*second party*] to their respective moieties, of and in the said messuages, tenements, lands, and hereditaments, have been approved of by the counsel of the said parties respectively, subject to the objection which arises to the title of the said [*first party*], to his undivided moiety by reason of the same having been conveyed to and vested in the said [*mortgagee*], subject and without prejudice to the devises and limitations contained in the said will of the said [*testator*], to or for the benefit of the issue male of the said [*first party*], in the manner hereinbefore mentioned and recited. NOW THESE PRESENTS WITNESS, that the said [*first party*] doth hereby agree with the said [*second party*], who doth hereby agree with the said [*first party*] in manner following; that is to say, THAT on or before the —— day of —— next, a partition or division shall be made of all and singular the said messuages, tenements, lands, and hereditaments in the schedule hereunder written mentioned or comprised, and all other the estates in the said parishes of —— and ——, if any, belonging in undivided moieties to them the said [*first party*] and [*second party*], into two separate allotments, of equal value, or as nearly so as circumstances will permit, shall be made by [*commissioner*], of ——, in the county of ——, land surveyor: THAT when and as soon as such partition or division shall have been made, the said [*first party*] and [*second party*], or some person or persons authorised by them respectively in that behalf, shall, under the direction, and in the manner directed by the said commissioner, draw lots for the said allotments: THAT it shall be lawful for the said commissioner to decide and determine, whether any and what sum of money shall be paid for equality of partition, and by which of the said parties such money shall be paid: THAT when it shall have been determined which of the said allotments shall be taken in severalty by the said [*first party*], and which of the said allotments shall be taken in severalty by the said [*second party*], and when the said commissioner shall have decided

First party has no issue male.

Agreement for partition.

Titles of both parties have been approved by their counsel,

except as to the issue male of first party.

Testatum.

Partition to be made by one commissioner.

Parties to draw lots for allotments.

Commissioner to determine equality of partition money.

Agreement to apply for act of Parliament to confirm partition.

and determined whether any and what sum of money shall be paid for equality of partition, and by which of the said parties such money shall be paid, the said parties respectively, or their respective heirs or assigns, shall, with all convenient speed, apply to Parliament for an act to confirm the said partition or division, and make, do, and execute all such other acts, deeds, or assurances, as the counsel of the said parties respectively, or their respective heirs or assigns, shall advise or require for the purpose of vesting such of the said allotments as shall have been decided in manner aforesaid, to be taken in severalty by the said [*first party*], with the appurtenances, in him the said [*first party*], his heirs and assigns, or to such uses, and in such manner, as he or they shall direct or appoint, *Subject* and without prejudice to the devises and limitations contained in the said will of the said [*testator*], deceased, to or for the benefit of the issue male of the said [*first party*]; AND for the purpose of vesting such of the said allotments as shall have been decided in manner aforesaid to be taken in severalty by the said [*second party*], with the appurtenances, in him the said [*second party*], his heirs and assigns, or to such uses and in such manner as he or they shall direct or appoint, THAT the said commissioner shall be and he is hereby authorized to make a survey of the said estates, and to cause a map or plan to be drawn thereof: THAT the costs, charges, and expenses of preparing, engrossing, and executing this present agreement, and of making such partition or division as aforesaid, and of applying for and obtaining an act of Parliament for confirming the same, and of making such survey, and such map or plan as aforesaid, and all other costs, charges, and expenses incurred, or to be incurred, in or about the said partition or division, or in anywise relating thereto; *Except* the costs, charges, and expenses which have been incurred by the said [*first party*], in making out the title to his own undivided moiety of the said messuages, tenements, lands, and hereditaments, and in investigating the title of the said [*second party*], to the other undivided moiety thereof; *And* the expenses which have been incurred by the said [*second party*] in making out the title to his own undivided moiety of the said messuages, tenements, lands, and hereditaments, and in investigating the title of the said [*first party*] to the other undivided moiety thereof; *And also except* any additional costs or charges which may be incurred by reason of the absence

37. PARTITION BY ONE COMMISSIONER AND ACT OF PARLIAMENT.

And execute conveyances to each other.

Subject to recited devises, as to first party's allotment.

Authority to commissioner to make survey and maps.

Costs to be borne equally,

except each to pay costs of making his own, and investigating other party's title.

And each to pay costs in-

37. PARTITION BY ONE COMMISSIONER AND ACT OF PARLIAMENT.

curred by his absence from England.

Each to pay for attested copies, &c. required by him.

from England of either of the said parties, (which additional costs or charges are to be paid by the party whose absence shall occasion the same), shall be paid and borne by the said [*first party*] and [*second party*], in equal proportions: THAT if either of the said parties to the said intended partition should require an attested copy or attested copies, of any title-deed or title-deeds, in the custody of the other party to the said partition; or to have a deed of covenant for the production of any such title-deed, or title-deeds, THEN and in such case, the expense of making such attested copy or copies, and the expenses attending the preparing, engrossing, and executing of such deed of covenant, shall be paid by the party requiring the same: AND WHEREAS by an indenture of feoffment, bearing date on or about the —— day of ——, 18—, and made between [*feoffor*], of &c., of the first part; and the said [*first party*] and [*second party*], of the second part; and [*trustee to prevent dower*] of the third part; and by livery of seisin, duly made, the said [*feoffor*], in consideration of the sum of £——, to him paid by the said [*first party*] and [*second party*], did enfeoff, release, ratify, and confirm, unto the said [*first party*] and [*second party*], and their heirs, *All that* close of land, situate, &c., *To hold* the same to the said [*first party*] and [*second party*], and their heirs: *as to, for, and concerning,* one undivided moiety, or half part thereof, *To such uses* as the said [*first party*] should appoint, in the manner and by the means therein mentioned: *And* in default of such appointment, and in the mean time subject thereto, *To the use* of the said [*first party*], and his assigns, for his life: With remainder, *To the use* of the said [*trustee,*] and his heirs, for the life of the said [*first party*], *In trust* for the said [*first party*] and his assigns, With remainder, *To the use* of the said [*first party*], his heirs and assigns; *And as to, for, and concerning,* the other one undivided moiety or half part thereof, (*repeat similar uses in favour of second party*). AND WHEREAS the said close comprised in the hereinbefore recited indenture of feoffment lies contiguous to the house and premises in the occupation of ——, (being part of the hereditaments so agreed to be parted and divided as aforesaid), and was so purchased by the said [*first party*] and [*second party*], as aforesaid, to the intent that the same might be held and enjoyed therewith: NOW IT IS HEREBY FURTHER AGREED, by and between the said [*first party*] and [*se-*

Recital of feoffment of close.

As to a moiety to uses, to prevent dower of first party's wife.

And as to the other moiety, to uses to prevent dower of second party's wife.

Close lies contiguous to a dwelling-house.

Further testatum.

cond party], that when the aforesaid partition or division shall have been completed, such one of the said parties to whom, upon such partition or division as aforesaid, the said house and premises in the occupation of the said —— shall be allotted in severalty, shall become the purchaser of the undivided moiety of the other party, of and in the said close, comprised in the hereinbefore in part recited indenture of feoffment, with the appurtenances, at the price of one moiety of the said sum of £——, at which the entirety thereof was purchased by the said [*first party*] and [*second party*], as hereinbefore is mentioned; and such purchase shall, as soon as the case will admit, be completed accordingly (*a*). In witness &c.

37. PARTITION BY ONE COMMISSIONER AND ACT OF PARLIAMENT.

Party to whom dwelling-house allotted, to purchase other's moiety in close at half of original purchase-money.

THE SCHEDULE ABOVE REFERRED TO.

Schedule.

(*a*) [It seems proper to add, "The person purchasing such moiety to pay the expense of the conveyance thereof, and not to require any other title than that which was deduced thereto on the purchase of the entirety by the said respective parties as aforesaid."]

To accept title deduced on the purchase.

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38. AGREEMENT *between a Husband and Wife, Tenants for Life successively, of one Moiety of Freehold Lands with a power in the Wife to appoint in Fee, and in Trustees to concur in making a Partition on the one part; and the Tenant in Common in Fee of the other Moiety, on the other; subject to Mortgages for Years of the Entirety; for a* Partition *by* Commissioners *or their* Umpire, *who are to make the Allotments without the Parties drawing Lots.*

38. PARTITION OF FREEHOLD BY COMMISSIONERS OR UMPIRE, SUBJECT TO MORTGAGES.

WITHOUT DRAWING LOTS.

ARTICLES OF AGREEMENT made the —— day of ——, 18—; Between [*first party*], of &c., and [*wife*], his wife, of the one part; and [*second party*], of &c., of the other part.

Parties.

WHEREAS immediately before the execution of the in-

Recitals, of

38. PARTITION OF FREEHOLD BY COMMISSIONERS OR UMPIRE, SUBJECT TO MORTGAGES.

dentures hereinafter recited, the said [*wife*], the wife of the said [*first party*], and the said [*second party*], were seised of or entitled to the messuages, lands, and hereditaments hereinafter particularly mentioned, with their appurtenances, for an estate of inheritance in fee-simple, as tenants in common in remainder or reversion, expectant immediately upon the decease of [*father with the same christian and surname as second party*], the elder, late of ——, deceased, subject nevertheless to certain mortgages for terms of years affecting the same premises. AND WHEREAS by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, 18—. the release being made between the said [*wife*], the wife of the said [*first party*], by her then name and description of [*maiden name*], of &c., spinster, of the first part, the said [*first party*], of the second part, and [*trustee*], of &c., of the third part, (being a settlement made previously to the marriage of the said [*first party*] with the said [*wife*], his wife, and which marriage afterwards took effect and was duly solemnized), *The* one undivided moiety or half part of the said [*wife, maiden name*], of and in the said messuages, lands, and hereditaments, with the appurtenances, was conveyed to the said [*trustee*], and his heirs, *To the use* of the said [*wife, maiden name*], and her heirs, until the solemnization of the said intended marriage, *And* immediately after the solemnization thereof, *To the use* of the said [*first party*], and his assigns, for the term of his natural life, without impeachment of waste, With remainder, *To the use* of the said [*wife, maiden name*], and her assigns, for the term of her natural life without impeachment of waste, With remainder, *To the use* of such person or persons as the said [*wife, maiden name*] should in the manner therein mentioned, either by deed or will, and whether sole or covert, direct or appoint; And in default of such direction or appointment, *To the use* of the said [*wife, maiden name*], her heirs and assigns. *And* in the said indenture of lease and settlement were contained the usual powers of leasing, and of selling, exchanging, and making partition. AND WHEREAS the said [*first party*], and [*wife*], his wife, and the said [*second party*], party hereto, have mutually agreed to effectuate a partition of the said messuages, lands, and hereditaments, upon the terms, and in the manner hereinafter mentioned. NOW THESE PRESENTS WITNESS, that the said [*first party*], and [*wife*],

seisin in fee as tenants in common in remainder,

after estate of tenant for life, now deceased, subject to mortgages.

Settlement of one moiety.

To the use of first party for life.

Remainder to wife for life.

Remainder as she should appoint.

Remainder to her in fee.

Usual powers to trustee to partition, &c.

Agreement for partition.

Testatum.

his wife, do hereby agree with the said [*second party*], party hereto, who doth hereby agree with the said [*first party*] and [*wife*], his wife in manner following; that is to say, THAT a partition and division of all and singular the said messuages, lands, and hereditaments into two separate allotments, of equal value, or as nearly so as circumstances will permit, shall be made, as soon as conveniently may be, by [*commissioner*], of &c., a commissioner nominated by and on behalf of the said [*first party*], and [*wife*], his wife, and [*commissioner*], of &c., a commissioner nominated by and on the behalf of the said [*second party*], party hereto; AND that if the said commissioners should differ in opinion, touching the said intended partition, or the mode of carrying the same into effect, or touching any matter relating thereto, *Then*, and in every such case, the subject-matter of every such difference of opinion shall be reduced into writing, and shall be referred to an umpire, to be named by the said [*commissioners*], before they proceed on the said arbitration, or the valuation or arrangement for that purpose; AND that the determination or decision of such umpire, upon the matter or matters so to be referred to him shall be final, binding, and conclusive, both upon the said commissioners, and upon the parties hereto: AND that when and so soon as such partition or division shall have been made, the said [*commissioners*], or in case of their difference, the said umpire, shall decide which of the said allotments shall be taken in severalty by the said [*first party*], and [*wife*], his wife, and which of the said allotments shall be taken in severalty by the said [*second party*], party hereto: AND that it shall be lawful for the said commissioners, or in case of their difference, the said umpire, to decide and determine whether any, and what sum of money, shall be paid for equality of partition, and by which of the parties such money shall be paid: AND that when it shall have been determined which of the said allotments shall be taken in severalty by the said [*first party*] and [*wife*], his wife, and which of the said allotments shall be taken in severalty by the said [*second party*], party hereto, and whether any and what sum of money shall be paid for equality of partition, and by which of the said parties such money shall be paid; the said parties respectively, and their respective heirs, appointees, or assigns, shall, with all convenient speed, make, do, and execute, all such acts, deeds, or assurances, as the

38. PARTITION OF FREEHOLD BY COMMISSIONERS OR UMPIRE SUBJECT TO MORTGAGES.

Partition to be made by commissioners.

And if they disagree, the decision of their umpire to be final.

Commissioners or umpire to decide what allotment each party shall have;

and the equality of partition money.

Parties to execute mutual conveyances.

38. PARTITION OF FREEHOLD BY COMMISSIONERS OR UMPIRE SUBJECT TO MORTGAGES.

counsel of the said parties respectively, or their respective heirs, appointees, or assigns, shall advise or require for the purpose of conveying and assuring such of the said allotments as shall have been decided in manner aforesaid to be taken in severalty by the said [*first party*] and [*wife*], his wife, with their appurtenances, to the uses, upon and for the trusts, intents and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements, in and by the hereinbefore in part recited indenture of settlement limited, expressed, or declared of or concerning the undivided moiety, hereditaments, and premises, thereby granted and released, or as near thereto as the deaths of parties and other circumstances will allow; And for the purpose of conveying and assuring such of the said allotments as shall have been decided in manner aforesaid to be taken in severalty by the said [*second party*], party hereto, with the appurtenances, unto him the said [*second party*], party hereto, his heirs and assigns, or to such uses, and in such manner, as he or they shall direct or appoint: And that such provisions shall be made for the payment by the respective parties of their shares of the monies due, or to become due, on the said mortgages respectively, as by the said commissioners, or their umpire, shall in that behalf be directed: And it is hereby further agreed, that the said [*commissioners*] shall be and they are hereby authorized to make a survey of the said estates, and to cause a map or plan to be drawn thereof: And that the costs, charges, and expenses of preparing, engrossing, and executing this present agreement, or in anywise relating thereto, and of making such partition or division as aforesaid, and of making such survey, and such map as aforesaid, and all other costs, charges, and expenses incurred, or to be incurred, in or about the said partition or division, or in anywise relating thereto, (*Except* the costs, charges, and expenses of the respective conveyances of the allotments to be taken in severalty) shall be paid and borne by the said [*first party*], and [*second party*], party hereto, in equal proportions: And that the expense of the conveyances of the allotment to be taken in severalty by the said [*first party*], and [*wife*] his wife, shall be borne by the said [*first party*]: And that the expense of the conveyances of the allotment to be taken in severalty by the said [*second party*], party hereto, shall be borne by him the said [*second party*], party

As to wife's moiety, to uses, &c. of settlement.

And as to second party's moiety, to him in fee.

Commissioners or umpire to decide who shall pay mortgage money.

Commissioners authorised to make a survey, &c.

All costs of partition to be borne equally.

Each party to pay costs of his own conveyance.

hereto: AND IT IS HEREBY FURTHER AGREED AND DECLARED, that the said commissioners, or their umpire, shall decide to which of the said parties the custody of the several title-deeds relating to the said hereditaments shall respectively belong, and by whom, and in what proportions, the expenses of any attested copies, or covenants for production of deeds which may be necessary, shall be borne. IN WITNESS &c.

38. PARTITION OF FREEHOLD BY COMMISSIONERS OR UMPIRE, SUBJECT TO MORTGAGES.

Commissioner or umpire to decide who shall have the title-deeds.

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39. AGREEMENT *for effecting a* PARTITION *of* FREEHOLD *and* COPYHOLD *Estates by* TWO COMMISSIONERS, *between a Lady on the eve of Marriage, and her Sister and her Husband;* RELEASE *in fee of the* FREEHOLD *Estates,* COVENANT *by the* HUSBAND *that his* WIFE *shall* ACKNOWLEDGE DEED; *and* COVENANT TO SURRENDER *the* COPYHOLD *Estates to Trustees, upon Trust to effect the Partition.*

39. PARTITION OF FREEHOLD AND COPYHOLD.

RELEASE IN FEE.

COVENANT TO SURRENDER COPYHOLD.

THIS INDENTURE, made the —— day of ——, in the year 18—, BETWEEN [*first party*], of &c., (spinster), of the first part; [*second party*], of &c., and [*wife*], his wife, of the second part; and [*trustees*], of &c., of the third part.

Parties.

WHEREAS (*a*) the said [*first party*], and [*wife*], the wife of

Recital of seisin

(*a*) If the seisin be in coparcenary, say,

"WHEREAS the said [*first party*], and [*wife*], the wife of the said [*second party*], are the only children and coheirs of [*father*], late of &c., who died in or about the month of ——, 18—, intestate, and a widower, and, as such coheirs, they the said [*first party*], in her own right, and the said [*second party*], and [*wife*], his wife, in the right of the said [*wife*], are seised in coparcenary of the fee-simple and inheritance in possession, in equal undivided moieties, of the freehold hereditaments, and of the inheritance in possession, according to the custom of the manor of ——, in the county of ——, of the copyhold or customary hereditaments here-

Recital of coparcenary in freehold and copyhold.

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in possession, under father's will.

the said [*second party*], are tenants in common in fee in possession of the freehold hereditaments, and are tenants in common of the inheritance in possession, according to the custom of the manor of ——, in the county of ——, of the copyhold or customary hereditaments hereinafter mentioned, and intended to be hereby respectively granted, released, and confirmed, and covenanted to be surrendered under and by virtue of the last will and testament of their late father, [*testator*], of &c., deceased, bearing date on or about the —— day of ——, 18—, and proved in the Prerogative Court of the Archbishop of Canterbury, on or about the —— day of ——, 18—.

Desire for partition,

AND WHEREAS the said [*first party*] and [*second party*], and [*wife*], his wife, are desirous that a partition should be made of the freehold and copyhold and customary hereditaments hereinafter mentioned, and intended to be hereby respectively granted, released, and confirmed, and covenanted to be surrendered, with their respective appurtenances:

and settlement.

And that the divided part which should be taken in lieu of the respective undivided moieties, or equal half parts or shares of the said [*first party*], and the said [*second party*], and [*wife*], his wife, in right of the said [*wife*], of and in the said freehold and copyhold or customary hereditaments, should be respectively settled in the manner hereafter mentioned or referred to concerning the same:

Agreement for perfecting same.

And for carrying the said desire into effect, it hath been agreed that the said [*first party*], and [*second party*], should enter into the covenants hereinafter contained:

And that the said freehold and copyhold or customary hereditaments should be respectively conveyed and surrendered to the use of the said [*trustees*], their heirs and assigns, *Upon the trusts* hereinafter declared concerning the same:

Testatum.

NOW THIS INDENTURE WITNESSETH, that in pursuance and part performance of the said agreement, it is hereby, with the privity and approbation of the said [*wife*], (testified by her being a party to, and sealing and delivering these presents), covenanted and agreed, between and by the said [*first party*], and the said [*second party*], as follows, that is to say;

Appointment of commissioners.

THAT [*commissioner*], of &c., shall be the person to divide on the behalf of the said [*first party*], the freehold or copy-

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inafter mentioned, and intended to be hereby respectively granted, released, and confirmed, and covenanted to be surrendered."

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hold or customary hereditaments hereinafter mentioned, and intended to be hereby respectively granted, released, and confirmed, and covenanted to be surrendered; And [*other commissioner*], of &c., shall be the person to divide the same hereditaments on the behalf of the [*second party*] and [*wife*], his wife: And that with all convenient speed, after the execution of these presents, the same hereditaments shall be divided by the said [*commissioner*], or the person to be appointed in his stead, as hereinafter is mentioned, and by the said [*other commissioner*], or the person to be appointed in his stead, as hereinafter is mentioned, into two parts of equal value, or as nearly so as possible, taking into account, on such division, the quantity, quality, and situation of the same hereditaments, and the leases to which the same are subject; That if before such division shall have been made as aforesaid, the said [*commissioner*], or any person to be appointed in his stead, as next hereinafter mentioned, shall die, or refuse, or become incapable [to do what may be necessary to be done on his part] to effect such division, Then and so often as the same shall happen, the said [*first party*], whether covert or sole, and notwithstanding her coverture, and after her decease, her executors or administrators, shall, within one calendar month after such death, or of such refusal or incapacity to act, appoint some other fit and competent person in his stead, to do what is hereby required to be done by the said [*commissioner*] for effecting the said division: That if before such division shall have been made as aforesaid, the said [*other commissioner*], or any person to be appointed in his stead, as next hereinafter mentioned, shall die, or refuse, or become incapable [to do what may be necessary to be done on his part] to effect such division, Then and so often as the same shall happen, the said [*second party*], and [*wife*], his wife, or the survivor of them, or the executors or administrators of such survivor, shall, within one calendar month after such death, or of such refusal or incapacity to act, appoint some other fit and competent person in his stead to do what is hereby required to be done by the said [*other commissioner*] for effecting the said division: That when such division shall have been made as aforesaid, the said [*first party*], her executors or administrators, and the said [*second party*], and [*wife*], his wife, or the survivor of them, or the executors or administrators of such survivor, shall, as soon as conveniently may be,

to make partition.

If first party's commissioner die, she to appoint another.

Same as to second party.

Parties to draw lots for priority of choice.

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by themselves or their agents, draw lots for the privilege of choosing one of the parts into which the said hereditaments shall be divided; and the successful party shall choose one of the said parts accordingly: AND if the said [*first party*], her executors or administrators, shall be the successful party, the divided part which she or they shall choose, shall be in lieu of the undivided moiety or equal half part or share of the said [*first party*], of and in the said hereditaments; and the other divided part shall be in lieu of the said undivided moiety, or equal half part orshare of the said [*second party*], and [*wife*], his wife, in right of the said [*wife*], of and in the said hereditaments: *But* if the said [*second party*], and [*wife*], his wife, or the survivor of them, or the executors or administrators of such survivor, shall be the successful party, Then the divided part which they, he, or she shall choose, shall be in lieu of the undivided moiety or equal half part or share of the said [*second party*], and [*wife*], his wife, in right of the said [*wife*], of and in the said hereditaments; and the other divided part shall be in lieu of the undivided moiety or equal half part or share of the said [*first party*], of and in the said hereditaments: THAT if upon such division as aforesaid, the persons making the same shall not be able conveniently to divide the said hereditaments into two parts exactly equal in value to each other, and shall in consequence award a sum of money to be paid for equality of partition, such sum shall, within three calendar months after the lots shall have been drawn, and such choice made as aforesaid, be paid as follows (that is to say); if the divided part of the greatest value shall be taken in lieu of the undivided moiety, or equal half part or share of the said [*first party*], then the sum which shall be so awarded as aforesaid, shall be paid by the said [*first party*], her heirs, executors, or administrators, to the said [*second party*], his executors, administrators, or assigns; *But* if the divided part of the greatest value shall be taken in lieu of the said undivided moiety or equal half part or share of the said [*second party*] and [*wife*], his wife, in right of the said [*wife*], then the sum which shall be so awarded as aforesaid, shall be paid by the said [*second party*], his executors, administrators, or assigns, to the said [*first party*], her executors, administrators, or assigns: THAT all the costs and charges of carrying these presents into effect, including the charges of the persons who are to make such division as aforesaid, shall be paid and borne in equal shares by the said [*first party*], her heirs, executors, or admin-

Allotments to be in lieu of undivided moieties.

Money awarded for equality of partition to be paid in three months.

Expenses to be paid equally.

istrators, and the said [*second party*], his heirs, executors, or administrators; THAT all the deeds, evidences, and writings which may relate solely to the title to any one of the two parts, into which the said hereditaments are to be divided as aforesaid, shall be delivered to the person or persons who shall become entitled to such part: AND that all the other deeds, evidences, and writings, which relate to the title of the hereditaments so to be divided as aforesaid, or any of them, shall be deposited or lodged in the hands or custody of some third person, to be mutually approved of by the parties interested; *Upon trust* to produce and shew forth the same from time to time, upon any trial or hearing, or upon the execution of any commission for the examination of witnesses, and upon all other necessary and reasonable occasions, for the purpose of shewing, evidencing, or making out the title to the said hereditaments, or any part or parts thereof, when and so often as occasion shall require, and to permit the same to be from time to time inspected by any person or persons interested in the hereditaments to which the same shall relate; but not to part with the same, or any of them, without the consent in writing of all persons beneficially interested therein; AND that, from time to time, and at all times hereafter, it shall be lawful for the persons beneficially interested in the hereditaments to which the last-mentioned deeds, evidences, and writings, or any of them, relate, to have free access thereto, and free liberty to inspect the same at all reasonable times, and at his, her, or their expense to make copies of the same or any of them. AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said agreement, and in consideration of the sum of ten shillings, by the said [*trustees*] to each of them, the said [*first party*] and [*second party*], and [*wife*], his wife, paid at or before the sealing and delivery of these presents, the receipts whereof are hereby respectively acknowledged, they, the said [*first party*] and [*second party*], and [*wife*], his wife, according to their respective estates, shares, and interests, but not further or otherwise, [*have*, and each and every of them *hath* granted, bargained, sold, released, and confirmed; And] by these presents *do*, and each and every of them *doth* grant, bargain, sell, release, and confirm unto the said [*trustees*], (in their actual possession now being by virtue of a bargain and sale to them thereof made by the said [*first party*] and [*second party*], and [*wife*], his wife, in consideration of five shillings,

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Deeds relating solely to either allotment to go with it.

All other deeds to be deposited with a third person for both parties' benefit.

Further testatum.

Release by several parties.

(Reference to lease for a year).

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by indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and

Freehold parcels.

to their heirs, ALL THOSE freehold messuages, lands, tenements, hereditaments, and premises, situate, &c., with their and every of their rights, members, and appurtenances;

General words for farms.

AND all houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow, and pasture, feedings, woods, underwoods, and the ground and soil thereof, commons, and common of pasture and of turbary, and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever, to the hereditaments hereby released, or otherwise assured, or intended so to be, or any of them respectively belonging, or in any wise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed, as part, parcel, or member of the same, or any of them respectively;

Reversion.

AND the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and of every part and parcel thereof;

All the estate.

AND all the estate, right, title, interest, trust, property, claim, and demand whatsoever of them the said [*first party*] and [*second party*], and [*wife*], his wife, and of each and every of them, in, to, and out of the same premises, and every of them, and every or any part or parcel thereof.

Habendum in fee to trustees.

TO HAVE AND TO HOLD the freehold hereditaments, hereby released, or intended so to be, with their and every of their appurtenances, unto the said [*trustees*], and their heirs, for ever;

To the use of them upon trusts aftermentioned.

To the use of the said [*trustees*], their heirs and assigns, for ever; *Upon* and for the trusts, intents, and purposes, hereinafter declared concerning the same.

Covenant by second party that his wife shall acknowledge deed.

AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said agreement, the said [*second party*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*trustees*], their heirs and assigns, That these presents, and the bargain and sale for a year, precedent thereto and hereinbefore referred to, shall forthwith, at the costs and charges of the said [*second party*], be duly acknowledged by the said [*wife*], and otherwise perfected by such solemnities as are prescribed by law, for rendering the deeds of married women effectual to pass or bind

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their estates of freehold in land. AND THIS INDENTURE FURTHER WITNESSETH, that in pursuance and further performance of the said agreement, the said [*first party*], so far as relates to her undivided moiety or equal half part of and in the copyhold or customary hereditaments hereinafter mentioned, but not further or otherwise, doth hereby for herself, her heirs, executors, and administrators; *And* the said [*second party*], (with the privity and approbation of the said [*wife*], his wife, testified as aforesaid), so far as relates to the undivided moiety or equal half part or share of the said [*second party*] and [*wife*], his wife, in right of the said [*wife*], of and in the same copyhold or customary hereditaments, but not further or otherwise, doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*trustees*], and their heirs, *That* they, the said [*first party*] and [*second party*], and [*wife*], his wife, will and shall at the next courts to be respectively held in and for the manor of ——, and the manor of ——, in the said county of ——, and at the joint costs and charges of the said [*first party*] and [*second party*] respectively, or their respective heirs, executors, or administrators, well and effectually surrender, or cause to be surrendered into the hands of the lords or ladies of the said manors respectively, *To the use* of the said [*trustees*], their heirs and assigns, ALL THOSE &c., [*describe parcels*]; *To hold* the same unto the said [*trustees*], their heirs and assigns, at the will of the lords or ladies of the said manors respectively, according to the respective customs thereof, by the rents and services therefore due and of right accustomed. *Upon* and for the trusts, intents, and purposes hereinafter declared concerning the same. AND *it is hereby agreed and declared* between and by the parties to these presents, that the said [*trustees*], their heirs and assigns, shall stand and be seised of and interested in the freehold and copyhold, or customary hereditaments and premises hereby respectively granted, released, and confirmed, and covenanted, to be surrendered, or intended so to be, with their respective appurtenances, upon and for the trusts, intents, and purposes following, that is to say; UPON TRUST, that they the said [*trustees*], or the survivor of them, or his heirs, do and shall permit and suffer the said hereditaments and premises to be divided agreeably to the covenants or agreements hereinbefore contained: AND in the meantime, and

Further testatum.

Covenant by first party as to her moiety;

and by second party, with consent of his wife, as to their moiety.

To surrender copyholds,

to the use of trustees in fee,

on trusts aftermentioned.

Declaration of trust.

To permit partition to be made.

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until, in pursuance of the said covenants or agreements, the said hereditaments and premises shall be divided, and the lots shall be drawn, and such choice made as aforesaid, UPON THIS FURTHER TRUST, that the said [*trustees*], or the survivor of them, or his heirs, do and shall pay the rents and profits of the said undivided moiety, or equal half part or share of the said [*first party*], of and in the said hereditaments and premises, to, or permit the same to be received by, the person or persons who would for the time being be entitled to the rents and profits of the divided part, which would have been taken in lieu of the same undivided moiety, or equal half part or share, if the intended partition had taken effect agreeably to the terms of these presents: *And* do and shall pay the rents and profits of the undivided moiety or equal half part or share of the said [*second party*], and [*wife*], his wife, in right of the said [*wife*], of and in the said hereditaments and premises, to, or permit the same to be received by, the person or persons who would for the time being be entitled to the rents and profits of the divided part, which would have been taken in lieu of the last-mentioned undivided moiety, or equal half part or share, if the said intended partition had taken effect, agreeably to the terms of these presents: AND when, in pursuance of the covenants or agreements hereinbefore contained, the said hereditaments and premises shall have been divided, and the lots shall have been drawn, and such choice made as aforesaid, then UPON THE TRUSTS following, that is to say; *As* to the divided part, which shall be taken in lieu of the undivided moiety, or equal half part or share of the said [*first party*], of and in the said hereditaments and premises; UPON TRUST that the said [*trustees*], or the survivor of them, or his heirs, do and shall, at the proper costs and charges of the said [*first party*], her heirs, executors, or administrators, convey and surrender the same with the appurtenances, unto and to the use of [*trustees of intended marriage settlement*], of &c., their heirs and assigns, *Upon* and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations, as shall be expressed and declared of and concerning the same, in and by an indenture intended to bear even date with these presents, and to be made between the said [*first party*] of the first part, [*intended husband*] of &c., of the second part, and the said [*trustees of settlement*], of the

And until partition, to permit respective parties to receive rents.

When partition and choice made,

first party's share,

to be conveyed to the trustees of her intended marriage settlement.

third part, (being the settlement intended to be executed previously to the marriage which is about to be solemnized between the said [*intended husband*] and [*first party*]): *And as* to the divided part which shall be taken in lieu of the undivided moiety, or equal half part or share of the said [*second party*], and [*wife*], his wife, in right of the said [*wife*], of and in the said hereditaments and premises, UPON and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations, as the said [*second party*], and [*wife*], his wife, by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be by them sealed and delivered in the presence of, and attested by two or more credible witnesses, shall from time to time direct or appoint: *And* in default of, or until such direction or appointment, and so far as the same if incomplete shall not extend; IN TRUST for the said [*second party*], and his assigns, during his life, without impeachment of waste: *And* after his decease, IN TRUST for the said [*wife*], his wife, her heirs, and assigns, for ever: PROVIDED ALWAYS, *and it is hereby declared and agreed* by and between all the parties to these presents, that the said [*trustees*] respectively, and their respective heirs, executors, administrators, and assigns, shall be charged and chargeable only for such monies as they respectively shall actually receive by virtue of the trusts hereby reposed in them, notwithstanding his or their, or any or either of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity: *And* shall not be answerable or accountable for any banker or other person, with whom or in whose hands any part of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise, in the execution of the trusts hereinbefore contained: nor for any misfortune, loss or damage, which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same should happen by or through his or their own wilful default respectively; and then, and in that case, each person respectively shall singly and alone be answerable for such loss or damage as shall arise from his or her own default: *And also*, that it shall be lawful for the said [*trustees*] respectively, their respective heirs, executors, administrators, and assigns, out of the monies which shall come to their respective hands by virtue of the trusts aforesaid, to retain all costs,

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Second party's share to be conveyed,

as husband and wife appoint by deed;

in default of appointment,

for husband for life;

remainder for wife in fee. Indemnity to trustees.

Trustees to reimburse themselves all costs, &c.

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charges, damages, expenses, and fees to counsel for advice, which they or any of them shall or may sustain or expend in the execution of the aforesaid trusts, or in relation thereunto: AND THE SAID [*first party*], so far as relates to her undivided moiety, or equal half part or share of and in the hereditaments and premises hereby respectively granted, released, and confirmed, and covenanted to be surrendered, or intended so to be, and their respective appurtenances, and the right to convey and surrender the same undivided moiety, or equal half part or share, and for the same undivided moiety or equal half part or share, being free from incumbrances, and for the quiet enjoyment, and further assurance thereof, but not further or otherwise, doth hereby for herself, her heirs, executors, and administrators: AND THE SAID [*second party*], so far as relates to the undivided moiety, or equal half part or share of the said [*second party*], and [*wife*], his wife, in right of the said [*wife*], of and in the hereditaments and premises hereby respectively granted, released, and confirmed, and covenanted to be surrendered, or intended so to be, and their respective appurtenances, and the right to convey and surrender the same undivided moiety, or equal half part or share, and for the same undivided moiety, or equal half part or share, being free from incumbrances, and for the quiet enjoyment and further assurance thereof, but not further or otherwise, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, with and to the said [*trustees*], their heirs and assigns, in manner following, that is to say; That (for and notwithstanding any act, deed, matter, or thing whatsoever, made, done, committed, executed, or suffered by them, the said [*first party*] and [*second party*], and [*wife*], his wife, to the contrary) they the said [*first party*] and [*second party*], and [*wife*], his wife, now at the time of the sealing and delivery of these presents, have in themselves good right, full power, and lawful and absolute authority, to grant, bargain, sell, release, convey, and surrender the freehold and copyhold, or customary hereditaments and premises, hereby respectively granted, released, and confirmed, and covenanted to be surrendered, or intended so to be, and every of them; and every part and parcel thereof, with their and every of their rights, members, and appurtenances, to the uses, and upon and for the trusts, intents, and purposes, and in manner and form aforesaid,

Covenant for title by first party as to her undivided moiety;

and by second party for himself and wife, for their undivided moiety;

for title.

39. PARTITION OF FREEHOLD AND COPYHOLD.

according to the true intent and meaning of these presents: AND LIKEWISE, that the hereditaments and premises hereby respectively granted, released, and confirmed, and covenanted to be surrendered, or intended so to be, and every of them, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, shall and lawfully may from time to time, and at all times hereafter, remain, continue, and be, to the several uses upon the several trusts, and for the several intents and purposes hereinbefore expressed and declared of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly; without the let, suit, trouble, denial, eviction, ejection, disturbance, molestation, hindrance, interruption, claim, or demand whatsoever, of, from, or by the said [*first party*] and [*second party*], and [*wife*], his wife, any or one of them, or the heirs of them, any or one of them, or any person or persons claiming, or to claim, by, from, through, under, or in trust for them, or any or one of them; AND free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by them the said [*first party*] and [*second party*], and [*wife*], his wife, or one of them, their, or one of their heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all [former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, intails, trusts, wills, statutes merchant, and of the staple recognizances, judgments, extents, executions, rents, arrears of rent, annuities, legacies, sum and sums of money, yearly payments, forfeitures, re-entries, cause and causes of forfeiture and re-entry, debts of record, debts due to the Queen's Majesty, and of, from, and against all and singular other] estates, titles, charges, and incumbrances whatsoever, made, done, executed, committed, or suffered by the said [*first party*] and [*second party*], and [*wife*], his wife, or any or one of them, (other than and except as to the said copyhold hereditaments, the rents, duties, and services, henceforth to be paid, done, and performed, for or in respect of the same hereditaments) (*a*); AND MOREOVER, that they the

Peaceable enjoyment.

Free from incumbrances.

For further assurance.

(*a*) [J. This precedent exemplifies an inaccuracy which is not of uncommon occurrence, namely, that of introducing as an exception to limited covenants for title and quiet enjoyment, incumbrances to which

Exception in limited covenants should be

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said [*first party*] and [*second party*], and [*wife*], his wife, and their heirs, and all and every other person or persons, having or lawfully claiming, or who shall or may at any time or times hereafter, have or lawfully claim, any estate, right, title, interest, inheritance, property, or demand whatsoever, either at law or in equity, of, in, to, or out of the freehold and copyhold, or customary hereditaments and premises, hereby respectively granted, released, and confirmed, and covenanted to be surrendered, or intended so to be, or of, in, to, or out of any of them, or any part thereof, by, from, under, or in trust for them, or any of them, will and shall, from time to time, and at all times hereafter, upon every reasonable request of the said [*trustees*], their heirs or assigns, but at the proper costs and charges of the person or persons at whose instance such request shall be made, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful acts, things, deeds, conveyances, surrenders, and assurances in the law whatsoever, for further, better, more perfectly and absolutely granting, releasing, confirming, surrendering, and assuring the freehold and copyhold or customary hereditaments and premises, hereby respectively granted, released, and confirmed, and covenanted to be surrendered, or intended so to be, to the several uses, upon the trusts, and for the intents and purposes hereinbefore declared concerning the same, or such of them as shall then be capable of taking effect; As by them the said [*trustees*], or the survivor of them, or his heirs, or any of them, their, or any of their counsel learned in the law, shall be advised or devised and required; So that such further assurance or assurances contain or imply in them no further or other covenant or warranty than against the person or persons who shall make and exe-

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confined to the acts of persons to which the covenants extends.

those covenants do not extend. Thus, it is obviously wrong in a covenant (as in the text) restricted to the acts of the covenantor, to except incumbrances created by an anterior owner; and yet we frequently find old mortgages, leases, and even land-tax referred to in this manner. Where it is intended that the grantee shall take subject to incumbrances not falling within the terms of the vendor's or grantor's limited covenants, and it is thought advisable to notice them in the deed (which it often is not), they should be recited in their proper place, in the deduction of the title, and afterwards shortly referred to in the *Habendum*. In mortgages and other instruments where the covenants are unrestricted, of course *any* incumbrances may properly be excepted in the covenants.J.]

cute the same, his, her, or their heirs, executors, and administrators' acts, and deeds only; and so that the party or parties, who shall be required to make and execute any such further assurance or assurances, be not compelled, or compellable for the making or doing thereof, to go or travel from his, her, or their dwelling, or respective dwellings, or usual place or places of abode. IN WITNESS &c.

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40. AGREEMENT *for an* EXCHANGE *of* FREEHOLD, COPYHOLD, *or* LEASEHOLD *Premises; with reference to Commissioners, or their Umpire, to determine the Sum to be paid for Equality of Exchange.*

40. EXCHANGE OF FREEHOLD COPYHOLD, OR LEASEHOLD.

ARTICLES OF AGREEMENT made the —— day of ——, 18—; BETWEEN [*first party*], of &c., of the one part; and [*second party*], of &c., of the other part.

Parties.

FIRST, the said [*first party*], for himself, his heirs, executors, and administrators, doth hereby agree with the said [*second party*], his (*a*) heirs and assigns, that he the said [*first party*], or his (*b*) heirs, will or shall, on or before the —— day of —— next, at his or their own expense, make and deliver to the said [*second party*], his agent or attorney, a full, complete, and perfect abstract, in the usual manner, of the title of him the said [*first party*], to ALL THAT dwelling-house and garden, situate &c., with the appurtenances (*c*). AND if the counsel of the said [*second party*]

Agreement by first party to deliver abstract.

FREEHOLD.

Parcels.

To execute conveyance.

(*a*) If the premises are leasehold, say,

LEASEHOLD.

"executors, administrators, and assigns,"

(*b*) "executors or administrators,"

(*c*) If the premises are leasehold, say,

"held by the said [*first party*], for the remainder of a term of —— years, granted by an indenture bearing date on or about the —— day of ——, 18—, and made between [*lessor*], of the one part, and [*lessee*], of the other part, subject to the rents, covenants, and conditions, therein contained

Reference to lease.

40. EXCHANGE OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

should be of opinion that the said [*first party*] has a good title to the inheritance in possession in fee-simple of the said dwelling-house and garden (*d*), that he the said [*first party*], or his heirs, and all other necessary parties, on or before the —— day of —— next, on receiving from the said [*second party*], such sum of money, if any, as shall be awarded for equality of exchange (*e*), will and shall, with pro-

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Lessor's title not to be produced.

but the said [*first party*] shall not be required to produce the lessor's title; AND if the counsel of the said [*second party*] should be of opinion that the said [*first party*] has a good title to the said dwelling-house and garden, for the remainder of the said term, that he the said [*first party*], and all other necessary parties, on or before the —— day of —— next, on receiving from the said [*second party*] such sum of money, if any, as shall be awarded for equality of exchange, will and shall assign and assure the said dwelling-house and garden to the said [*second party*], for the residue of the said term, free from incumbrances, but subject as aforesaid, in consideration of such money, if any, for equality of exchange, and of a conveyance of the two closes of leasehold land, hereinafter mentioned; in which conveyance shall be contained covenants, by the said [*first party*], that, notwithstanding any act done by the said [*first party*], [or the person under whom he claims], the lease is valid, not forfeited, surrendered, or determined, or become void or voidable; that the said [*first party*] has, or the assigning parties have, good right to assign; that the rent has been paid, and the covenants performed to the time of assigning; for quiet enjoyment during the term, free from incumbrances; and for further assurance: AND ALSO a covenant by the said [*second party*] to pay the rents and perform the covenants and agreements reserved and contained in the same indenture of lease, and to indemnify the said [*first party*] therefrom."

Covenants to be contained in assignment.

COPYHOLD.

(*d*) If the premises are copyhold of inheritance, say,
"according to the custom of the manor of ——, in the county of ——, of which the same premises are holden,"

To surrender,

(*e*) "duly surrender the same according to the custom of the said manor, to the use of the said [*second party*], his heirs or assigns, or as he or they shall direct, to be holden at the will of the lord, according to the custom of the said

40. EXCHANGE OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

per covenants for title, for quiet enjoyment, and for further assurance, and other proper and necessary covenants, execute a proper conveyance of the fee-simple, and inheritance in possession, of the said dwelling-house and garden, with the appurtenances, free from incumbrances, unto the said [*second party*], his heirs, appointees, or assigns, in consideration of such money, if any, for equality of exchange, and of a conveyance of the fee-simple and inheritance in possession, free from incumbrances, of and in the two closes of land, with the appurtenances hereinafter mentioned: AND THE SAID [*second party*], for himself, his heirs, executors, and administrators, doth hereby agree with the said [*first party*], his (*f*) heirs and assigns, that he, the said [*first party*], or his (*g*) heirs, will or shall, on or before the said —— day of —— next, at his and their own expense, make and deliver to the said [*first party*], his agent or attorney, a full, complete, and perfect abstract, in the usual manner, of the title of him the said [*second party*], to ALL THOSE two closes of land, situate &c., with the appurtenances (*h*):

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manor by the rents and services therefore due and of right accustomed, but free from all incumbrances whatsoever, AND ALSO execute a deed of covenants for the title, for quiet enjoyment, and for further assurance, and all other proper necessary covenants."

and execute deed of covenants.

(*f*) If the premises are leasehold, say,

LEASEHOLD.

"executors, administrators, and assigns,"

(*g*) "executors or administrators,"

(*h*) If the premises are leasehold, say,

"held by the said [*second party*], for the remainder of a term of —— years, granted by an indenture bearing date on or about the —— day of ——, 18—, and made between [*lessor*], of the one part, and [*lessee*], of the other part, subject to the rents, covenants, and conditions therein contained; but the [*second party*] shall not be required to produce the lessor's title*: AND if the counsel of the said [*first party*] should be of opinion that the said [*second party*] has a good title to the said two closes of land, for the remainder of the said term, that he the said [*second party*]

Reference to lease.

To assign.

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* *Vide ante*, p. 70.

40. EXCHANGE OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

AND if the counsel of the said [*first party*] should be of opinion that the said [*second party*] has a good title to the inheritance in possession in fee-simple of the said two closes of land (*i*), that he, the said [*second party*], or his heirs, and all other necessary parties, on or before the —— day of —— next, on receiving from the said [*first party*] such sum of money, if any, as shall be awarded for equality of exchange (*k*), will and shall, with proper covenants for title, for quiet enjoy-

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and all other necessary parties, on or before the —— day of —— next, on receiving from the said [*first party*] such sum of money, if any, as shall be awarded for equality of exchange, will and shall assign and assure the said two closes of land to the said [*first party*], for the residue of the said term, free from incumbrances, but subject as aforesaid, in consideration of such money, if any, paid for equality of exchange, and of a conveyance of the said dwelling-house and garden; in which conveyance shall be contained covenants by the said [*second party*], that notwithstanding any act done by the said [*second party*], [or the person under whom he claims], the lease is valid, not forfeited, surrendered, or determined, or become void or voidable; that the said [*second party*] has, or the assigning parties have, good right to assign; that the rent has been paid, and the covenants performed, to the time of assigning; for quiet enjoyment during the term, free from incumbrances; and for further assurance: AND ALSO a covenant by the said [*first party*] to pay the rents, and perform the covenants and agreements reserved and contained in the same indenture of lease, and to indemnify the said [*second party*] therefrom."

COPYHOLD.

(*i*) If the premises are copyhold of inheritance, say,

"according to the custom of the manor of ——, in the county of ——, of which the same premises are holden,"

(*k*) "duly surrender the same according to the custom of the said manor, to the use of the said [*first party*], his heirs or assigns, or as he or they shall direct, to be holden at the will of the lord, according to the custom of the said manor, by the rents and services therefore due and of right accustomed, but free from all incumbrances whatsoever. AND ALSO execute a deed of covenants for the title, for quiet enjoyment, and for further assurance, and all other proper and necessary covenants."

ment, and for further assurance, and other proper and necessary covenants, execute a proper conveyance of the fee-simple and inheritance in possession of the said two closes of land, with the appurtenances, free from incumbrances, unto the said [*first party*], his heirs, appointees, or assigns, in consideration of such money, if any, for equality of exchange, and of a conveyance of the fee-simple and inheritance in possession, free from incumbrances, of and in the said dwelling-house and garden, with the appurtenances: And *it is hereby mutually agreed* by the said parties, that it shall, at the joint expense of both parties, be referred to [*commissioners*], of &c., and in case of their differing in opinion, then to an umpire, to be chosen by them, to decide and determine whether any and what sum of money shall be paid for equality of exchange, by either of the said parties unto the other of them (*m*); And that it shall be expressly declared in the said conveyances to each of the said parties, that neither of them shall re-enter on the lands conveyed in exchange, in consequence of any defect of title (*n*): And that each of the said parties shall, at the time of executing the said con-

40. EXCHANGE OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

Commissioners or umpire to determine equality of exchange-money.

No implied warranty.

To deliver title-deeds.

(*m*) It may be prudent to add clause for appointing new commissioners, *ut ante*, p. 231.

(*n*) If it be the agreement, instead of the above clause, say,

"And that there shall be contained in the said conveyances to each of the said parties, the usual clause of re-entry on the lands given in exchange, on eviction from any part of the lands received in exchange."

Eviction clause.

[As to these clauses, and the subject of exchanges in general, *vide post*, Vol. 4, p. 1.]

Warranty on exchange.

In consequence of the implied right of re-entry which is incident to exchange, it may sometimes be prudent, although it is not usual, for the exchangers to execute covenants for producing the title-deeds, mutually received, or for each to retain copies of those given; because, it seems, that when lands received in exchange, &c. are sold, the vendor ought to produce an abstract of the title and the deeds relating to the lands *given*, as well as those *received* in exchange*, as the purchaser might otherwise be evicted from the lands purchased, on account of a defect in the title to the lands given in exchange. [*Vide post*, Vol. 4, p. 1.]

Covenant for production of title-deeds given on exchange.

[*Unless, in the case of an exchange at common law, the lands given in exchange can be proved to have been aliened by the other party.]

40. EXCHANGE OF FREEHOLD, COPYHOLD, OR LEASEHOLD.

veyances, deliver to the other the several title-deeds in his custody or power relating to the lands conveyed in exchange (*o*): AND that each of the said parties shall pay the costs and charges for preparing and engrossing the (*p*) conveyance of the premises received by him in exchange; *And* the costs and charges of any assignment of outstanding terms not already assigned to attend the inheritance of the premises given by him in exchange; *And* the fees and charges of his own counsel and solicitor (*q*). IN WITNESS &c.

Expenses of conveyances.

Terms, &c.

Fees of counsel, &c.

(*o*) If the title-deeds relate to lands of greater value, *vide ante*, p. 460.

COPYHOLD.

(*p*) If the premises are copyhold, say, "surrender of and deed of covenants relating to the premises received by him in exchange."

(*q*) And if it be the agreement of the parties, add *Clause for liquidated damages, ut ante*, p. 542.

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41. EXCHANGE.

41. AGREEMENT *for an* EXCHANGE, *between a* MAYOR AND CORPORATION *and a private Individual, rather specially drawn.*

ARTICLES OF AGREEMENT made and entered into the —— day of ——, 18—; BETWEEN the mayor, aldermen, and burgesses of the borough of ——, of the one part; and [A. B.], of &c., of the other part, as follows:

Parties.

Corporation agree to convey in exchange.

THE said mayor, aldermen, and burgesses do hereby, for themselves and their successors, agree with the said [A. B.], his heirs and assigns, That the said mayor, aldermen, and burgesses, or their successors, will or shall, by proper conveyances and assurances in the law, convey and assure according to their estate, right, and interest therein, or so far as they can or lawfully may, unto and to the use of the said [A. B.], his heirs and assigns, ALL &c., (*describe the estate pretty fully*); which ground, land, and soil, is more particularly delineated and described in the plan or ground-plot

Parcels.

Reference to plan.

41. EXCHANGE.

Agreement with the corporation to make an embankment, and keep it in repair.

thereof hereunto annexed, and distinguished by a green colour. AND THE SAID [A. B.] doth hereby, for himself, his heirs, executors, and administrators, agree with the said mayor, aldermen, and burgesses, that he the said [A. B.], his heirs or assigns, will or shall, in the conveyance or assurance so to be made to him by the said mayor, aldermen, and burgesses as aforesaid, enter into a proper covenant and agreement for raising, at the costs and charges of the said [A. B.], the said embankment, within the space of seven years from the date of such conveyances and assurances, in such manner as shall not be prejudicial to the said town of ——; and for keeping up and maintaining the same at his and their costs and charges, and to promise to repair the same during the space of seven years. PROVIDED ALWAYS, *and it is hereby agreed* between the said mayor, aldermen, and burgesses, and the said [A. B.], that nothing herein, or in the said intended conveyances and assurances to be contained, shall extend to, or be deemed or construed to extend to a warranty, covenant, or undertaking by the said mayor, bailiffs, burgesses, and commonalty, of or for their title to the said ground, &c. so agreed to be conveyed by them unto and to the use of the said [A. B.], his heirs and assigns, as aforesaid, or any part thereof, or to entitle the said [A. B.], his heirs, executors, administrators, or assigns, to bring, commence, sue forth, or prosecute any action, suit, claim, or demand whatsoever, against them the said mayor, bailiffs, burgesses, and commonalty, or their successors, for, upon, by reason, or on account of his the said [A. B.], his heirs or assigns, being evicted of or from, or being disturbed in the possession of the said ground, &c., or any part thereof, by any person or persons whomsoever, *Except* the said mayor, aldermen, and burgesses. AND THE SAID [A. B.], for himself, his heirs, executors, and administrators, doth hereby agree with the mayor, aldermen, and burgesses of the said borough of ——, That he, the said [A. B.], his heirs or assigns, will or shall, as soon as conveniently may be, by proper conveyances and assurances in the law, grant and convey unto the said mayor, aldermen, and burgesses, and their successors, ALL THAT &c., (*describe the estate*); AND THE SAID mayor, aldermen, and burgesses, for themselves and their successors, do further agree with the said [A. B.], his heirs and assigns, by these presents, That if the said [A. B.], his heirs or assigns, should at any time hereafter apply for a

Proviso, that corporation shall not be considered as warranting the title.

Covenant to convey to corporation.

Parcels.

Covenant by corporation to concur with [A. B.] in applying for King's license,

41. EXCHANGE. or act of Parliament, to confirm exchange.

proper license from the Crown, or for an act of Parliament for a grant of confirmation to him the said [A. B.], his heirs or assigns, of the said ground, &c., so agreed to be conveyed by them the said mayor, aldermen, and burgesses of the said borough of ——, unto and to the use of the said [A. B.], his heirs and assigns, as aforesaid, or any part thereof, Then and in such case, the said mayor, aldermen, and burgesses, will or shall, upon the request of the said [A. B.], his heirs or assigns, join and concur with the said [A. B.], his heirs or assigns, in such application, and testify their consent thereto, and do all such other reasonable acts and deeds for facilitating and promoting the success of such application, and assisting the said [A. B.], his heirs or assigns, therein, as by the said [A. B.], his heirs or assigns, or his or their counsel learned in the law, shall be reasonably advised or devised and required. AND *it is hereby further agreed* between and by the said mayor, aldermen, and burgesses, and the said [A. B.], that the said [A. B.], his heirs, executors, administrators, or assigns, shall pay all fees, charges, duties, and expenses, as well attending the preparing and engrossing these presents, as the preparing, settling, and engrossing the several conveyances and assurances so agreed to be made and executed by the said mayor, bailiffs, burgesses, and commonalty, and by the said [A. B.] respectively as aforesaid, and the obtaining such license from the Crown, and act of Parliament as aforesaid. IN WITNESS whereof the said mayor, aldermen, burgesses, and commonalty have hereunto set their seal, and the said [A. B.] hath hereunto set his hand and seal, the day and year first above written (*a*).

Agreement respecting expenses.

(*a*) [There should be no witness to the execution by the corporation, *infra*, Vol. 4, p. 65.]

42. AGREEMENT *to apply for a* PRIVATE ACT *of Parliament for effectuating an* EXCHANGE *of* ADVOWSON *between a* BISHOP, *Patron in right of his Episcopal See, and a* LAY PATRON.

42. PRIVATE ACT TO EXCHANGE ADVOWSON WITH A BISHOP.

ARTICLES OF AGREEMENT made the —— day of ——, in the year of our Lord, 18—; BETWEEN the Right Reverend Father in God, [*bishop*], Lord Bishop of ——, of the one part; and [A. B.], of &c., of the other part.

Parties.

WHEREAS the said Lord Bishop of ——, in right of his episcopal see, is seised of the advowson, or right of patronage and presentation of, in, and to the rectory and parish church of [A.], in the county of ——: AND the said [A. B.] is seised in fee-simple of the advowson, or right of patronage and presentation of, in, and to the rectory and parish church of [B.], in the county of ——: AND the said rectory of [B.] is of greater value than the said rectory of [A.]; but in consequence of the vicinity of the said parish of [A.] to the principal residence and estates of the said [A. B.], he the said [A. B.] is desirous of obtaining the said advowson of the said rectory of [A.] in exchange for the said rectory of [B.]; and the said Lord Bishop of —— has consented to such exchange; but the same cannot be effected without the aid and authority of Parliament (*a*): NOW THEREFORE the said Lord Bishop of —— doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [A. B.], his heirs and assigns, that it shall be lawful for the said [A. B.], his heirs or assigns, at his or their own costs and charges, at any time in

Recital—of seisin of bishop in right of see

of [A. B.] in fee;

and his desire for exchange.

Agreement by bishop to permit [A. B.] to apply for private act,

(*a*) The necessity of an act of Parliament in this case is evident; because all alienations by ecclesiastical persons of property belonging to them in their ecclesiastical capacity, except leases for twenty-one years, or three lives, are declared void, by 1 Eliz. c. 19; 13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 11; 1 Jac. 1, c. 3. *Et vide infra*, Vol. 4, p. 244; Vol. 5, p. 212.

42. PRIVATE ACT TO EXCHANGE ADVOWSON WITH A BISHOP.

the next session of Parliament, to apply for a private act of the Legislature for the purpose of vesting and settling the said advowson of the said rectory and parish church of [B.] in and upon the said Lord Bishop and his successors for ever, in lieu of and in exchange for the said advowson of the rectory and parish church of [A.]; AND for vesting and settling the said advowson of the rectory and parish church of [A.] in and upon the said [A. B.], his heirs and assigns, for ever; *With* cross eviction and general saving clauses; *And* any other usual or proper clauses and provisions which Parliament may permit: AND ALSO, that he the said Lord Bishop will sign the petition for the said private act, and do every other act and thing which may be necessary on his part to procure the same to be passed into a law, in the next session of Parliament. AND THE SAID [A. B.] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said Lord Bishop, his executors and administrators, that he the said [A. B.] will in due time prepare and sign the said petition for the said act of Parliament, and do every other previous and subsequent act and thing which may be necessary on his part to procure the same to be passed into a law, in the next session of Parliament; AND ALSO will bear, pay, and discharge the costs and charges for these presents and a duplicate hereof, and all the costs, charges, and expenses in any manner attending the soliciting, passing, and printing the said act, and every other expense relating thereto; AND therefrom, and from every part thereof respectively, save, defend, and keep harmless the said Lord Bishop, his executors and administrators. IN WITNESS &c.

for vesting the advowson of [B.] in the bishop;

and for vesting the advowson of [A.] in [A. B.] with eviction, &c. clauses;

and bishop to consent thereto.

Agreement by [A. B.] to prepare petition, &c.,

and pay all costs,

and indemnify the bishop therefrom.

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43. ENFRANCHISEMENT.

43. AGREEMENT *for* ENFRANCHISEMENT *of Copyhold Premises.*

ARTICLES OF AGREEMENT made and entered into this —— day of ——, 18—, BETWEEN [*lord*], of &c., esquire, lord of the manor of ——, in the county of ——, and seised of an estate of inheritance in fee-

Parties.

simple in the same manner, of the one part; and [*tenant*], of &c., one of the copyhold tenants of the said manor, of the other part. 43. ENFRANCHISEMENT.

FIRST, the said [*lord*], for himself, his heirs, executors, and administrators, *doth* agree with the said [*tenant*] to sell to him the fee-simple and inheritance (*a*) of and in ALL THAT messuage, &c., with the commons and commonable rights (*b*), privileges, and appurtenances, thereto belonging or apper- Agreement by lord to enfranchise. Parcels.

(*a*) A lord *pro tempore* can only enfranchise for his own time: but under an express power, or, as it seems, under the usual powers of sale and exchange, tenants for life of manors in strict settlement may enfranchise in fee. [*St. Paul* v. *Dudley*, 15 Ves. 167: *Wilson* v. *Allen*, 1 Jac. & W. 611. Persons having partial interests in manors are authorised to enfranchise in fee, for particular purposes, by various acts of Parliament; as, for redeeming the land-tax, (42 Geo. 3, c. 116); for building new churches, (58 Geo. 3, c. 45, and subsequent acts recited in the 3 & 4 Vict. c. 60). And see stat. 48 Geo. 3, c. 73, ss. 13, 14, 15, 16, 17, authorising the enfranchisement of copyholds held of the Crown.] Enfranchisement:—*Dominus pro tempore.*

[J. It seems to be the better opinion, that a copyholder accepting enfranchisement from the lord, brings upon his estate any incumbrances affecting the manor. On this point a learned writer has observed, "A contrary doctrine has been advanced; and there is, it is believed, a decision to that effect, though frequent research has not discovered the case: but the principle on which this doctrine is maintained is not easily discovered; for, when the copyhold estate ceases, the estate under the freehold tenure must take effect in possession; and conveyancers have uniformly acted on such acceleration, and often guard against it by creating a term of years out of the copyhold tenure, prior to the enfranchisement, that the title to the possession may depend on that tenure." 1 Prest. Abs. 302. See Preston on Merger, 541. J.] Incumbrances on manor.

[An heir may take an enfranchisement before admittance, and, so it should seem, may a devisee or other surrenderee. *Wilson* v. *Allen*, 1 Jac. & W. 611. So, it seems, may an equitable owner of a copyhold, who has been erroneously admitted. Ib. As to whether a release of all seignorial rights would amount to an enfranchisement, see 1 Scriven on Copyholds, 653. The true question seems to be, whether the terms of such release would be held to amount to a release of all estate; and it is submitted that, in analogy with the numerous cases which have settled that, particular operative words of conveyance are not generally essential. Where the intent is clear, such words would be held to carry the estate; for the right to enter on escheat, &c., as reversioner, is one of the seignorial rights.] Admittance. Release of seignorial rights.

[As to presuming an enfranchisement, see *Roe* d. *Johnson* v. *Ireland*, 11 East, 280.]

(*b*) Immediately on the lands being enfranchised in fee, they become severed from the manor, and held of the lord above, under the same Enfranchisement extin-

43. ENFRANCHISEMENT.

taining, situate, &c.; now held for an estate of inheritance (*c*) by the said [*tenant*], by copy of court roll, according to the custom of the said manor, free from incumbrances, and absolutely enfranchised and discharged from all manner of rents, fines, heriots, fealty, suits, and services whatsoever (*d*), at or for the price or sum of £——: AND that he, the said [*lord*], will within one month from the date hereof, at his own expense, make and deliver to the said [*tenant*] a full and perfect abstract of the title of him the said [*lord*], in the usual manner, to the fee-simple and inheritance of the said manor: AND ALSO that the said [*lord*], or his heirs, and all other necessary parties, will and shall, within two months from the date hereof, on receiving the said purchase-money,

To deliver abstract.

To execute conveyance.

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guishes common, unless expressly granted.

tenure and services as the former or mesne lord held; therefore, all rights and privileges annexed to the copyholder's estate, as such, must be done away; as the estate by copy, to which they attached, has ceased to exist; thus, if a copyholder has common of pasture or estovers in right of his copyhold, and the copyhold be enfranchised, the common is gone, since the copyhold is gone in right of which it was claimed. *Dawson* v. *Hunter*, Noy, 136, *infra*, p. 641. As the estate is no longer copyhold, or even held of the manor, all customs relative to copyholds within the manor must fail as to the premises enfranchised.

Enfranchisement to particular tenant enures to remainder-man.

(*c*) If the copyholder have only a particular estate in the premises, and he take a conveyance of the freehold in fee, it shall be an absolute enfranchisement; the copyhold tenure shall be extinct for ever. [*Dunn* v. *Green*, 3 P. Wms. 9: *Challoner* v. *Marshall*, 2 Ves. 9, 524; *Roe* d. *Clemett* v. *Briggs*, 16 East, 415. See *Doe* d. *Newly* v. *Jackson*, 2 Dowl. & Ry. 514; 1 B. & Cr. 448. And as to the effect of an enfranchisement to a tenant for life, see *Margaret Podger's case*, 9 Rep. 104.] But the enfranchisement shall be for the benefit of those in remainder, who would have taken the copyhold interest, had the enfranchisement never taken place, as well as for that of himself; and a Court of equity will, accordingly, direct a conveyance from the heirs-at-law of the particular tenant to him in remainder, on his paying a proportionate part of the consideration advanced for the enfranchisement. *Winne* v. *Cookes*, 1 Bro. Ch. Ca. 517; 1 Watk. Cop. 364: *Wilson* v. *Allen*, 1 Jac. & W. 611. *Et vide* Scriven on Copyholds, 616, 2nd ed. [But an enfranchisement to a tenant for life operated in favour of the first remainder-man in tail to bar the issue and remainder-men; inasmuch as it left no other means to do so. *Challoner* v. *Marshall*, 2 Ves. jun. 523. See *Dunn* v. *Green*, 3 P. Wms. 10: *Cann* v. *Cann*, 1 Vern. 480: *Barker* v. *Turner*, Id. 393, 458; 2 Ch. Cas. 174.]

(*d*) [No services can be reserved upon an enfranchisement since the stat. *Quia Emptores;* and if a rent is stipulated for, it is a rent-charge only, and not a rent service. *Bradshaw* v. *Lawson*, 4 T. R. 443. See *Doe* d. *Reay* v. *Huntington*, 4 East, 271: *Moore* v. *Lord Plymouth*, 7 Taunt. 618.]

43. ENFRANCHISEMENT.

at the costs and charges of the said [*tenant*], execute a proper conveyance, with the usual covenants for the title, for quiet enjoyment, and for further assurance, for conveying and assuring the fee-simple and inheritance of the said messuage, &c., with the commons and commonable rights, privileges, and appurtenances thereto belonging and appertaining, free from incumbrances, and enfranchised as aforesaid, unto the said [*tenant*], his heirs and assigns, or as he or they shall direct: AND ALSO that the said [*lord*] shall, at his own costs and charges, at the execution of the said conveyance, deliver unto the said [*tenant*] true and attested copies of the several title-deeds, evidences, and writings concerning the said premises; and enter into the usual covenant, to be prepared by and at the expense of the said [*lord*], for producing the originals, at the costs and charges of the said [*tenant*], his heirs or assigns; and to permit him and them, from time to time, to take or have other true and attested copies thereof, at his or their own costs and charges; but such covenant, nevertheless, to be void, if the said [*lord*] should afterwards sell the said manor or any part thereof, and deliver the same deeds and writings to the purchaser thereof, and procure such purchaser to enter into the same, or the like covenants: AND ALSO, that any assignment of attendant terms, not already assigned to attend the inheritance, which may be necessary on the conveyance of the said premises, shall be prepared by and at the costs and charges of the said [*lord*]. AND THE SAID [*tenant*], for himself, his heirs, executors, and administrators, doth agree to pay the said sum of [*purchase-money*] unto the said [*lord*], on the execution of the said conveyance. AND *it is further agreed*, that each of the said parties shall pay the fees and charges of his own counsel and solicitor. (*If it be the agreement, add clauses, time to be the essence of the contract, and for liquidated damages*, ut ante, pp. 542, 546). IN WITNESS &c. (*e*)

To deliver attested copies,

and covenant for their production.

To pay for assignments of terms, &c.

Agreement by tenant to pay purchase-money.

Each party to pay his own counsel, &c.

(*e*) [A copyholder's right of common in the wastes of the lord within the manor (for that out of it belongs to the land, and not to the copyholder's estate) is extinguished by enfranchisement, and therefore a deed operating to enfranchise copyholds usually contains an express regrant of the commonable right. *Fort* v. *Ward*, Moore, 667: *Worledge* v. *Kingswel*, Cro. Eliz. 794; 2 And. 168: *Crowder* v. *Oldfield*, Salk. 170, 366; Holt, 146: *Barwick* v. *Matthews*, 5 Taunt. 375; 1 Marsh. 50: *Speaker* v. *Styant*, Comb. 127: *Styant* v. *Staker*, 2 Vern. 250. A grant of *all appurtenances* to the copyhold estate does not include the com-

Rights of common extinguished by enfranchisement.

43. ENFRANCHISEMENT.

Extinguishment of common.

mon. *Bradshaw* v. *Eyre*, Cr. El. 570: *Marsham* v. *Hunter*, Cro. Jac. 253: *Lee* v. *Edwards*, 1 Brownl. 173. But the right of common is not destroyed in equity by an enfranchisement, if the intention appear to have been that it should be preserved. *Styant* v. *Staker*, 2 Vern. 250. See *Lanesborough* v. *Ockshott*, 1 Br. P. C. 151; Com. Dig. *Copyh.* (K. 6); 2 Eq. Ab. 104, pl. 10. It seems that a grant, in general terms, of all commons belonging to an estate would not operate as a new grant of the common formerly but not then appurtenant to it; *Fort* v. *Ward*, Moore, 667; *contrà*, where the grant is of all commons belonging to the estate, and *theretofore usually enjoyed therewith*. *Worledge* v. *Kingswel*, Cro. Eliz. 794.]

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

44. AGREEMENT *by an original Lessor to* REBUILD *Part of Premises destroyed by Fire, in consideration of a certain Sum paid to him by an Under-lessee:* RELEASE *from original Lessor to Lessee, and from Lessee to Under-lessee, of the Covenants of the respective Leases, so far as they relate to the Buildings not to be re-erected; and* DEFEAZANCES *reviving the Conditions of the Leases, which were partially dispensed with by the Releases.*

Parties.

Recital of original lease.

Parcels.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*lessor*], of &c., of the first part, [*lessee*], of &c., of the second part, and [*under-lessee*], of &c., of the third part; WHEREAS by indenture of lease, bearing date on or about the —— day of ——, 17—, and made between the said [*lessor*], of the one part, and the said [*lessee*], of the other part, for the considerations therein mentioned, the said [*lessor*] did demise unto the said [*lessee*] *All that* manor, or reputed manor, called ——; *And all that* messuage or mansion-house, with the coach-house, stable, yards, gardens, and orchards thereto belonging; *And also all that* messuage, tenement, or farm, adjoining to the first-mentioned messuage, or mansion-house, and together therewith, then in the possession of [*tenant*], and commonly called or known by the name of —— Farm; the said premises being situate, lying, and being in the parishes of ——, or one of them, in the county of ——; *Together* with all and singular the yards, gardens, orchard, backsides, barns, stables, sheep-

houses, and granaries, cow-houses, outhouses, edifices, and buildings; *And also all those* several closes, pieces, or parcels of arable land, ley, meadow, pasture, wood, and wood ground, lying and being in —— aforesaid, or one of them, to the secondly above-mentioned messuage, tenement, or farm-house belonging and therewith then and theretofore usually held, used, occupied, and enjoyed, and thereinafter particularly mentioned and described; *And all* other lands, grounds, tenements, and hereditaments, in the said parishes of ——, or either of them, or elsewhere near adjoining, then in the occupation of the said [*tenant*] as tenant to the said [*lessor*], (*except* as therein is excepted): *To hold* the same unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— then next, for the term of forty years: At the yearly rent of £——, payable half-yearly, as therein mentioned; and also for every acre of the meadow or pasture ground he the said [*lessee*], his executors, administrators, or assigns, should ear, plough, dig up, or convert into tillage, the yearly sum of five pounds, payable as therein mentioned: *And subject* to several covenants, in the said indenture of lease contained; *Among* which the said [*lessee*] did, for himself, his heirs, executors, administrators, or assigns, covenant with the said [*lessor*], his heirs and assigns, that he the said [*lessee*], his executors, administrators, or assigns, should, at his or their own proper costs and charges, from time to time, and at all times during the continuance of the said demise, well and sufficiently repair, amend, support, sustain, maintain, scour, empty, cleanse, preserve, and keep in repair, the said two several messuages or tenements, and all and singular the outhouses, edifices, buildings, barns, stables, sheep-houses, granaries, cow-houses, gates, pales, rails, stiles, hedges, ditches, and fences, belonging to the thereby demised premises, he the said [*lessor*], his heirs or assigns, upon reasonable request and timely notice to him or them made and given in writing, finding and allowing on the said premises, or within five miles' distance thereof, (after the sum of £—— should have been laid out and expended in repairing the said messuages or tenements, and the outbuildings thereto belonging, in manner therein mentioned, and which hath since been done accordingly), sufficient and necessary rough timber on the stem for the doing thereof; (that is to say), so far as concerned or related to the said premises as they then stood, but not as to any new erections, buildings, or

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

Habendum.

Reddendum.

Covenant by lessee to repair.

Lessor allowing rough timber.

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

additions, which should be erected, built, or made thereon or thereto, (such rough timber to be cut down and carried to the thereby demised premises at the charges of the said [*lessee*], his executors, administrators, or assigns); and that he the said [*lessee*], his executors, administrators, or assigns, the demised premises so repaired, amended, and kept in repair as aforesaid, at the end, expiration, or other sooner determination of the said lease, should leave and yield up into the hands and quiet possession of the said [*lessor*], his heirs or assigns: *And also subject* to the conditions therein contained, such conditions being to the same effect as the conditions contained in the defeazance hereinafter inserted on the part of the said [*lessee*], his executors, administrators, and assigns: *And* in which indenture of lease is contained a covenant on the part of the said [*lessor*], his heirs, executors, administrators, and assigns, that he the said [*lessor*], his heirs or assigns, should from time to time, and at all times (after the said sum of £—— should have been laid out and expended in manner therein mentioned) during the continuance of the said demise, at seasonable times for cutting timber, find, provide, and allow unto the said [*lessee*], his executors, administrators, or assigns, on the premises thereby leased, or within five miles' distance therefrom, on reasonable notice in writing for that purpose, all necessary and sufficient rough timber on the stem for the repairing and amending thereof; (that is to say), so far as concerned the said premises as they then stood, but not for the making, repairing, or amending of any new erections, buildings, or additions, which should or might be erected, built, or made thereon or thereto; the said timber to be cut and carried to the thereby demised premises at the charges of the said [*lessee*], his executors, administrators, or assigns. AND WHEREAS, by indenture of lease, bearing date on or about the —— day of ——, 18—, and made between the said [*lessee*], of the one part, and the said [*under-lessee*], of the other part, the said [*lessee*], for the considerations therein mentioned, did demise and lease unto the said [*under-lessee*], *All that* the said manor or reputed manor, messuage, or mansion-house, coach-house, stable, yards, gardens, orchard, backsides, barn, stable, granaries, cow-houses, outhouses, edifices, and buildings, closes, pieces or parcels of arable land, ley, meadow, pasture, wood and wood-ground, by the same or a like description as hereinbefore contained; *And all* other lands, grounds, tenements,

Conditions.

Covenant by lessor to allow rough timber.

Recital of under-lease.

Parcels.

and hereditaments in the said parishes of ——, or either of them, or elsewhere near adjoining, then late in the occupation of the said [*tenant*], but then or late in the occupation of the said [*lessee*], (*Except* as in the now recited indenture of lease is excepted): *To hold* the same unto the said [*under-lessee*], his executors, administrators, and assigns, from the feast of the Annunciation of the blessed Virgin Mary, then last, for the term of —— years, and one half of another year wanting one day: *At* the yearly rent of £——, payable half-yearly, as therein mentioned, and for the last half year wanting one day the rent of £——; *And also* for every acre of the meadow or pasture ground which he the said [*under-lessee*], his executors, administrators, or assigns, should ear, plough, dig up, or convert into tillage, the yearly sum of ——, payable as in the same indenture of lease is mentioned: *And subject* to several covenants in the same indenture contained on the part of the said [*under-lessee*], his heirs, executors, administrators, or assigns; *Among* which are covenants to the same purport or effect as the covenants hereinbefore recited to be contained on the part of the said [*lessee*], his executors, administrators, and assigns, in the above recited indenture of lease of the —— day of ——, 17—; *And also subject* to the conditions therein contained, such conditions being to the same effect as the conditions contained in the defeazance hereinafter inserted on the part of the said [*under-lessee*], his executors, administrators, and assigns: *And* in which indenture of lease of the —— day of ——, 18—, is contained a covenant on the part of the said [*under-lessor*], his executors, administrators, and assigns, to the same purport or effect as the covenant hereinbefore recited to be contained in the said indenture of lease of the —— day of ——, 17—, on the part of the said [*lessor*], his heirs, executors, administrators, and assigns. And whereas a barn, wood-house, cow-house, and shed, part of the premises hereinbefore recited to have been demised by the said [*lessor*] to the said [*lessee*], and by him demised to the said [*under-lessee*], were, in or about the month of ——, 18—, partly destroyed and consumed by fire; *And* it hath been agreed by and between the said parties to these presents, that the barn and part of the shed, so destroyed by fire, shall be rebuilt, without rebuilding at any time, during either of the said terms, the wood-house, cow-house, and the remaining part of the shed; *And* there-

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

Habendum.

Reddendum.

Covenants by lessee.

Conditions.

Covenants by lessor.

Recital, part of premises was destroyed by fire,

part only of which intended to be rebuilt.

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

upon it hath been agreed, that the several covenants, agreements, releases, and conditions hereinafter contained shall be respectively entered into, given, and revived. AND WHEREAS the said [*lessor*] hath contracted and agreed with the said [*under-lessee*] to rebuild the said barn and part of the shed so destroyed by fire as aforesaid, in the manner hereinafter particularly mentioned, on receiving from the said [*under-lessee*] the sum of £——, being the sum which he hath received from the —— fire office, on account of the damage occasioned by the said fire. NOW THIS INDENTURE WITNESSETH, that, for and in consideration of the sum of £——, of lawful British money, to the said [*lessor*] paid by the said [*under-lessee*], at or before the sealing and delivery of these presents, (the receipt of which sum of £——, he the said [*lessor*] doth hereby acknowledge, and from the same and every part thereof doth release and discharge the said [*under-lessee*], his heirs, executors, administrators, and assigns), he the said [*lessor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*under-lessee*], his executors, administrators, and assigns, THAT he the said [*lessor*], his executors or administrators, will or shall, within the space or time of six calendar months from the day of the date of these presents, erect, build, and completely cover in and finish the barn and cattle shed, set forth in the schedule hereunder written; AND ALSO do, perform, and execute, or cause to be done, performed, and executed, all and singular the works also mentioned in the schedule hereunder written, according to the plan and elevation therein mentioned or contained, the same to be done within the time aforesaid, and in a good, workmanlike, substantial manner: AND ALSO will or shall find and provide such good, proper, and sufficient materials, of all kinds whatsoever, as together with, and in addition to the materials not consumed by the said fire, shall be proper and sufficient for erecting the said barn and cattle-shed, and completely finishing the said works, buildings, and erections. AND *it is hereby declared and agreed*, by and between the said [*lessor*] and the said [*under-lessee*], that in case he the said [*under-lessee*], his executors, administrators, or assigns, should direct any more work to be done in or about the said buildings and premises than is contained in the schedule hereunder written, then and in such case the said

Recital of agreement by lessor to rebuild for a certain sum.

Agreement to build outhouses,

and find materials.

Additional work to be paid for.

[*under-lessee*], his executors, administrators, or assigns, shall pay or cause to be paid unto the said [*lessor*], his executors, administrators, or assigns, so much money as such extra work, and the materials used therein, shall cost or amount unto, any thing hereinbefore contained to the contrary notwithstanding: AND *it is hereby declared and agreed*, by and between the said [*lessor*] and [*under-lessee*], that if any dispute or difference should happen or be made between them touching or concerning the edifices and buildings hereby covenanted to be made and done as aforesaid, or touching or concerning any other matter or thing whatsoever, relating to the work hereby contracted to be done, or such additional or extra work (if any) as aforesaid, Then such dispute or difference shall be left to the determination and award of three indifferent persons, one to be named by the said [*lessor*], his executors, administrators, or assigns, another by the said [*under-lessee*], his executors, administrators, or assigns, and the third to be chosen by the said persons so to be named by each of them the said [*lessor*] and [*under-lessee*], and their respective executors, administrators, and assigns, jointly, immediately, or within ten days after notice of such dispute or difference. AND each of them the said [*lessor*] and the said [*under-lessee*] doth hereby, for himself his heirs, executors, and administrators, covenant and agree with the other of them, his executors and administrators, that they the said [*lessor*] and [*under-lessee*] respectively, and their respective executors or administrators, will and shall severally stand to, abide, perform, and keep the award and determination of the said three persons so to be chosen, or of any two of them, touching the said several matters and things so to be referred to them as aforesaid; So as the same determination be made in writing, under the hands and seals of the said arbitrators, or some two of them, within one calendar month next after such reference. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, he the said [*lessor*] *doth* by these presents remise, release, and quit claim unto the said [*lessee*], his heirs, executors, administrators, and assigns, the above recited covenants of him the said [*lessee*] in the said indenture of lease of the —— day of ——, 17—, contained; *And also* all and all manner of actions, causes of actions, suits, debts, sums of money, contracts, damages, judgments, executions, claims, and demands whatsoever, in law and

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

Agreement to refer disputes to arbitration.

Covenant to abide by award.

Release of covenants by original lessor, so far as they relate to buildings not to be re-erected.

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

equity, which against the said [*lessee*], his heirs, executors, administrators, and assigns, he the said [*lessor*] ever had, now hath, or which he, his heirs or assigns, hereafter can, shall, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever, *So far* only as the same covenant and other matters relate to or concern the repairing, amending, supporting, sustaining, maintaining, preserving, keeping, rebuilding, leaving, and yielding up in repair the said wood-house, and cow-house, and shed, and that part of the said shed so destroyed by fire as aforesaid, and which is not intended to be rebuilt as aforesaid. AND THE SAID [*lessee*], for the considerations aforesaid, *doth* by these presents remise, release, and quit-claim unto the said [*lessor*], his heirs and assigns, the above recited covenant of him the said [*lessor*], contained in the said indenture of lease of the —— day of ——, 17—; *And also* all and all manner of actions, causes of actions, suits, debts, dues, sums of money, contracts, damages, judgments, executions, claims, and demands whatsoever, in law and equity, which against him the said [*lessor*], his heirs, executors, administrator, and assigns, he the said [*lessee*], his executors, administrators, or assigns, ever had, now hath, or which he or they hereaftar can, shall, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever, so far only as the same covenants and other matters relate to or concern the finding, providing, and allowing, unto the said [*lessee*], his executors, administrators, or assigns, rough timber for building, repairing, and amending the said wood-house and cow-house, and that part of the shed which has been so destroyed by fire as aforesaid. AND THE SAID (*a*) [*lessee*] doth by these presents, for himself, his executors, administrators, and assigns, grant unto the said [*lessor*], his heirs and assigns, That in case the said yearly rent of £——, reserved in and by the said recited indenture of lease of the —— day of ——, 17—, or any part thereof, or the said additional yearly rent

Release of covenants by original lessee, so far as they relate to buildings not to be re-erected.

Defeazance, reviving condition of original lease.

Condition dispensed with in part, is dispensed with in whole.

(*a*) As the condition in the original lease embraces non-performance of the covenants, &c.; and as the covenants are partially released by this deed, whereby part of the condition is dispensed with; and as, according to the principle established by *Dumpor's case*, 4 Co. 119, a dispensation of a condition in part is a dispensation in the whole, the condition should therefore be revived; otherwise the lessor would not have power to re-enter on non-payment of the rent, or non-performance of the covenants. [*Vide vost*, Vol. 4, p. 375.]

of five pounds, (if any such should happen to be or become payable), or any part thereof should be behind or unpaid by the space of twenty-one days next over or after either of the days of payment whereon the same is or ought to be paid, and the same rent should be lawfully demanded upon, or at any time after the expiration of the said twenty-one days, and not paid when demanded; *Or* if breach or default should hereafter happen to be made in the observance or performance of all or any of the covenants or agreements in the said indenture of lease contained on the part and behalf of the said [*lessee*], his executors, administrators, and assigns, to be observed and performed, (except as hereinbefore is mentioned), *Then* and in either of the said cases it shall be lawful for the said [*lessor*], his heirs or assigns, into the premises demised by the first recited indenture of lease, or any part thereof in the name of the whole, wholly to re-enter, and the same to have again, retain, repossess, and enjoy, as in his and their first and former estate and estates, and the said [*lessee*] his executors, administrators, and assigns, and all other the tenants and occupiers of the same, thence to expel and remove, any thing herein or in the first recited indenture of lease contained to the contrary thereof in anywise notwithstanding. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, he the said [*under-lessor*] *doth* by these presents remise, release, and quit claim the said [*under-lessee*], his heirs, executors, administrators, and assigns, of and from the covenants of him the said [*under-lessee*] in the above recited indenture of lease of the —— day of ——, 18—; *And also* of and from all and all manner of actions, causes of actions, suits, debts, dues, sums of money, contracts, damages, judgments, extents, executions, claims, and demands whatsoever in law and equity, which against the said [*under-lessee*], his heirs, executors, administrators, and assigns, he the said [*under-lessor*] ever had, now hath, or which he, his executors, administrators, or assigns, hereafter, can, shall, or may have for, upon, or by reason of any matter, cause, or thing whatsoever, so far only as the same covenants and other matters relate to or concern the repairing, amending, supporting, sustaining, maintaining, preserving, keeping, rebuilding, leaving, and yielding up in repair, the said wood-house and cow-house, and that part of the said shed so destroyed by fire as aforesaid, which is not to be rebuilt. AND THE

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

Release of covenants by under-lessor, so far as they relate to buildings not to be re-erected.

Release of

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

said [*under-lessee*], for the same considerations aforesaid, *doth* by these presents remise, release, and quit claim the said [*under-lessor*], his heirs, executors, administrators, and assigns, of and from the covenant of him the said [*under-lessor*], contained in the said indenture of lease of the —— day of ——, 18—; *And also*, of and from all and all manner of actions, causes of actions, suits, debts, sums of money, contracts, damages, judgments, extents, executions, claims, and demands whatsoever, in law and equity, which, against him, the said [*under-lessor*], his heirs, executors, administrators, and assigns, he the said [*under-lessee*], his executors, administrators, or assigns, ever had, now hath, or which he or they hereafter can, shall, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever, so far only as the same covenants and other matters relate to or concern the finding, providing, and allowing unto the said [*under-lessee*], his executors, administrators, or assigns, rough timber for building, repairing, and amending the said wood-house, and cow-house, and that part of the said shed which has been so destroyed by fire as aforesaid, and which is not intended to be rebuilt as aforesaid. AND THE SAID [*under-lessee*] doth by these presents, for himself, his executors, administrators, and assigns, grant unto the said [*under-lessor*] his executors, administrators, and assigns, That in case the said yearly rent of £——, reserved in and by the above recited indenture of lease of the —— day of ——, 18—, or any part thereof, or the said additional yearly rent of five pounds an acre (if any such should happen to be or become payable), or any part thereof, should be behind or unpaid by the space of twenty-one days next over or after either of the days of payment whereon the same is or ought to be paid, and the same rent should be lawfully demanded, upon or at any time after the expiration of the said twenty-one days, and not paid when demanded; *Or* if breach or default should hereafter happen to be made in all or any of the covenants and agreements in the last-mentioned indenture of lease contained on the part and behalf of the said [*under-lessee*], his executors, administrators, and assigns, to be observed and performed, (except as hereinbefore is mentioned), *Then*, and in either of the said cases, it shall be lawful for the said [*under-lessor*], his executors, administrators, or assigns, into the said premises by the same indenture of lease demised, or any part thereof in the name

covenants by under-lessee, so far as they relate to buildings not to be re-erected.

Defeazance, reviving condition by under-lessee.

of the whole, wholly to re-enter, and the same to have again, retain, repossess, and enjoy, as in his and their first and former estate, and the said [*under-lessee*], his executors, administrators, and assigns, and all other the tenants and occupiers of the same, thence to expel and remove, any thing herein or in the last-mentioned indenture of lease contained to the contrary thereof in anywise notwithstanding. [And *it is hereby agreed* that the new barn and cattle-shed to be built or rebuilt, pursuant to the covenant hereinbefore contained on the part of the said [*lessor*], shall be and be considered as a barn and shed, within the scope and compass of the several covenants contained in the said several indentures of lease, and the condition introduced into these presents (*r*).] In witness &c.

44. TO BUILD; PARTIAL RELEASE OF COVENANT; AND DEFEAZANCE REVIVING CONDITION.

New barn, &c. to be deemed a barn, &c. within the scope of covenants in lease.

(*r*) [This seems to be quite an unnecessary addition.]

45. AGREEMENT *to permit the Continuance of Obstruction to ancient* Lights (*a*),

45. TO PERMIT OBSTRUCTION TO ANCIENT LIGHTS.

ARTICLES OF AGREEMENT made the —— day of ——, 18—; Between [A. B.], of &c., of the one part; and [C. D.], of &c., of the other part.

Parties.

WHEREAS there are two ancient window lights on the south side of the dwelling-house of the said [A. B.], situate at —— aforesaid, and which window lights have been totally obstructed by a dwelling house and premises which the said [C. D.] hath lately erected upon his lands adjoining thereto. And whereas it hath been agreed between the said [A. B.] and [C. D.], for the purpose of preventing disputes between the owners and occupiers of the said two dwelling-houses, to enter into the declaration or agreement following, that is to say: And first the said [C. D.] admits and declares that the said [A. B.] was well entitled to the said window lights;

Recital of having ancient lights, and obstruction by buildings.

To prevent disputes,

admission of right to lights.

(*a*) [See some observations as to lights, ways, &c., *post*, Vol. 4, p. 148.]

45. TO PERMIT OBSTRUCTION TO ANCIENT LIGHTS.

And agreement to allow obstruction.

Release of all actions, &c.

AND that the said [A. B.] voluntarily, and from motives of friendship and good neighbourhood, agreed that the said [C. D.] might obstruct them, as before mentioned: AND THE SAID [A. B.] on his part agrees that the said window lights shall and may for ever remain obstructed as before mentioned: AND he hereby releases to the said [C. D.], his heirs and assigns, *All* actions, suits, claims and demands whatsoever, on account thereof. IN WITNESS &c.

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46. TO CHARGE LANDS WITH MONEY SECURED BY BOND.

Acknowledgment of agreement.

Agreement to charge.

Parcels.

46. AGREEMENT *to* CHARGE LANDS *with the Payment of a Sum of Money secured by Bond.*

I, THE WITHIN-NAMED [*obligor*], do hereby acknowledge and declare, that previously to, and as a consideration and inducement to the within-named [*obligee*] for advancing to me the sum of £——, secured by the within-written bond, I did agree to charge, and in pursuance of that agreement I DO HEREBY charge, and for myself and my heirs do agree, at my own costs and charges, to do and execute every act and deed that shall, by the said [*obligee*], his executors, administrators, or assigns, or his or their counsel, be reasonably required or deemed necessary for the better and more effectual charging, either by mortgages in fee or for years, or otherwise, ALL my freehold and copyhold messuages, lands, and tenements, situate and being in the several parishes of ——, or elsewhere in the county of ——, with the payment of the said sum of £——, at the time within mentioned and appointed for the payment thereof, with interest for the same after the rate of five pounds for a hundred pounds by the year. WITNESS my hand, this —— day of ——, 18—.

WITNESS

47. AGREEMENT *for employing an* INSURANCE BROKER. 47. TO EMPLOY INSURANCE BROKER.

ARTICLES OF AGREEMENT made this —— day of ——, in the year 18—, BETWEEN [*underwriter*], of &c., of the one part; and [*broker*], of &c., of the other part. Parties.

WHEREAS THE SAID [*broker*] is an insurance broker, residing at —— aforesaid. AND WHEREAS the said [*underwriter*] is desirous of becoming an underwriter or insurer of ships or vessels, and of merchandize on board ships or vessels, and of employing the said [*broker*] as his broker or agent for the purpose of making and effecting such insurances, and for receiving the premiums of insurance, under and subject to the terms and agreements hereinafter contained. Recitals.

FIRST, the said [*underwriter*] doth hereby agree with the said [*broker*], that it shall be lawful for the said [*broker*], until orders or notice to the contrary, to act as the agent or broker of the said, [*underwriter*], and to use the name and engage the credit of the said [*underwriter*] as an insurer or underwriter of any sum or sums of money on any ship or vessel, or goods and merchandizes in any ship or vessel, so as the responsibility of the said [*underwriter*] on any one risque, either on a ship or vessel, or goods or merchandize in a ship or vessel, or both jointly or separately, may not exceed the sum of £—— at one and the same time, and so as the name of the said [*underwriter*] as an insurer or underwriter shall be used as to such ships or vessels, goods or merchandize only, on which insurances shall be transacted at the office or house of business of the said [*broker*] in the regular and ordinary course of his business as an insurance broker, and on such risques only as are insurable in the common and ordinary course of business, (that is to say), at a premium not exceeding £—— per centum on the sum insured: AND that for the purpose of making such insurances as aforesaid, Underwriter authorises broker to act as his agent, and use his name and credit, under certain conditions. To execute policies, and give

47. TO EMPLOY INSURANCE BROKER.

it shall be lawful for the said [*broker*] to use the name and act as the attorney of the said [*underwriter*], and to sign, seal, and deliver any policy or policies of insurance in the name and as the act and deed of the said [*underwriter*],

acquittances for premiums:

and to receive and give acquittances and discharges for any premium or premiums which shall be payable for or in respect of any insurance to be made from time to time in the name and on the account of the said [*underwriter*]: AND

and to allow broker a salary.

that he the said [*underwriter*] will yearly and every year, on the —— day of ——, in every year, and in that proportion for any less time than a year, give and allow to the said [*broker*] a salary of £—— of lawful British money, so long and during such time as he shall be employed by the said [*underwriter*] as his broker, under or by virtue of these presents.

Agreement by broker not to engage underwriter's credit beyond a certain sum, and under other conditions.

SECONDLY, the said [*broker*] doth hereby agree with the said [*underwriter*], that he the said [*broker*] will not at any time, while employed by the said [*underwriter*] as his broker under or by virtue of these presents, engage the name or responsibility of the said [*underwriter*] for any sum exceeding £——, on any one risque on one and the same ship or vessel, or goods or merchandizes in the same ship or vessel, jointly or separately, or on any risque on which the premium shall exceed £—— per centum for the insurance; or in any insurance other than and except such insurances as shall be transacted at the office or house of business of the said [*broker*], and in the regular and ordinary course of transacting the same business: AND

To render accounts of risques.

that he the said [*broker*] will from time to time, at the request of the said [*underwriter*], render and give to the said [*underwriter*] an account of all risques in which the said [*underwriter*] shall be then engaged as an insurer, with all such particulars as shall be necessary to enable the said [*underwriter*] to ascertain

And of monies received.

the nature of the same risques; and also of all money which from time to time shall have been received on account of the said [*underwriter*] in respect of the premiums of insurance; and also of all losses which shall have been sustained, or be claimed, under any insurance or insurances in which the name or responsibility of the said [*underwriter*] shall have been engaged (*a*).

(*a*) It may be collected to be the intention of the parties, that

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THIRDLY, *it is hereby agreed* by and between the said parties, that, yearly and every year, on the —— day of ——, in every year, during such time as the said [*broker*] shall be employed and act as the agent or broker of the said [*underwriter*], the accounts of profits and loss on such insurances as aforesaid, as shall have been made in the preceding year, shall be made up and settled; *And* that such accounts of profits shall comprise the premiums received and not returned; *And* that the account of losses shall include all sums payable or to be paid by the said [*underwriter*] as such insurer, together with such costs, charges, and expenses incurred in settling or ascertaining the liability of the said [*underwriter*], or the quantum or extent of the loss to which he shall be liable, but not the salary of the said [*broker*]; *And* the balance remaining for profit, if any, shall be divided into two equal parts; *And* that one of the said half parts shall belong to and be retained by the said [*broker*] in addition to his said salary, and as a further compensation for his agency; *And* that the other moiety, or half part of the said profits shall belong and be payable and paid to the said [*underwriter*], his executors, administrators, or assigns, subject nevertheless to the right of the said [*broker*] to retain thereout the said sum, or salary of £—— a year, unless the same shall have been previously paid by the said [*underwriter*]; *And* that the same moiety, or half part of profits, subject to such deduction as aforesaid, shall be paid to the said [*underwriter*], his executors, administrators, or assigns, by the said [*broker*], out of any money in his hands; BUT nothing hereinbefore contained shall make the said [*broker*] liable to pay or contribute all or any part of any losses, arising from any insurance to be made as aforesaid, other than and except by way of damages for breach or non-performance of all, any, or either of the agreements hereinbefore contained on his part.

Accounts to be settled yearly.

Account of profits.

Account of losses.

Profits to be equally divided.

Broker not to be liable to losses.

[AND LASTLY, each of them the said [*underwriter*] and Covenant by

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the broker is not to settle losses without the authority of the principal; but perhaps it is better expressly to negative this power by adding,

Broker not to settle losses without authority of principal.

"but which losses are not to be paid or settled by the said [*broker*] without the express direction and authority of the said [*underwriter*]."]

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both parties to perform agreement.

[*broker* doth hereby for himself, his heirs, executors, and administrators, covenant, declare, and agree to and with the other of them, his executors and administrators, that each of them the said [*underwriter*] and [*broker*] respectively, and his respective executors and administrators, will or shall, from time to time, observe, perform, fulfil, and keep to and with the other of them, his executors or administrators, the articles, clauses, stipulations, and agreements hereinbefore contained, to be observed, performed, and kept by him or them, on his or their part and behalf, according to the true intent and meaning of these presents.] IN WITNESS &c.

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48. MANUFACTURERS AND FACTOR.

48. AGREEMENT *between* MANUFACTURERS *and a* FACTOR.

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*factor*], of &c., of the one part; and [*four copartners, principals*], all of &c., of the other part.

Recital of agreement to act as factor.

WHEREAS the said [*factor*] hath agreed with the said [*principals*] to act as their agent or factor, in the vending of ——, in the city of London, for the term of —— years.

Testatum.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the covenants and agreements hereinafter entered into by the said [*principals*], he the said [*factor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*principals*], severally and respectively, and with their several and respective executors, administrators, and assigns, in manner following; that is to say,

Covenant to act as factor for —— years.

THAT he the said [*factor*] will act as the factor or agent of the said [*principals*], and of the survivors, and survivor of them, and of such person or persons as may be copartner or copartners in trade with them, or the survivors or survivor of them, in the vending of ——, for the term of —— years from the date hereof, determinable nevertheless as hereinafter mentioned:

At the house of principals.

AND that he the said [*factor*] will conduct and carry on the said agency, at the shop or warehouse of

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the said [*principals*], in —— street, in the city of London, or in such other shop or warehouse, in the said city of London, as they, or the survivors or survivor of them, may direct or appoint for that purpose: AND that he the said [*factor*] will devote and give his whole time and attention to the said agency, and will not engage in the business of a seller of ——, or in any other business whatsoever, either on his own account, or as a factor or agent, and either alone or in copartnership with any person or persons whomsoever: AND that he the said [*factor*] will carefully deposit and preserve, in the shop or warehouse for the time being made use of for the purpose of the said agency business, all such goods, wares, and merchandizes, as may be sent or transmitted to him by the said [*principals*], or the survivors or survivor of them, or any person or persons who may be copartner or copartners in trade with them, or the survivors or survivor of them: AND that in managing and conducting the said agency, he the said [*factor*] will use his best endeavours to procure the greatest possible sale of the —— and other goods which he shall be employed to sell as such factor as aforesaid, either for ready money, or to persons of responsibility, and worthy to be trusted: AND that in selling upon credit, he the said [*factor*] will be circumspect and cautious, and will make due inquiries from persons of respectability, whether the persons applying to purchase on credit are persons of responsibility, and worthy to be trusted; *And*, upon making every such inquiry, will make a minute or memorandum thereof, in a book to be kept for that purpose, specifying the name of the person applying to purchase on credit, the name or names of the person or persons applied to for the purpose of knowing whether such person might be trusted with safety, and also specifying what was said upon the subject, by such person or persons so applied to: AND ALSO, that he the said [*factor*] will not give credit to any person or persons, for a greater length of time than ——, without the consent in writing of the said [*principals*], or the survivors or survivor of them; *And* will not, without such consent, sell to any person on credit to a greater amount than the sum of £——: AND ALSO, that he the said [*factor*] will, in conducting the said agency, conform to and govern himself by such orders, instructions, and directions, as he may from time to time receive from the said [*principals*], or the survivors or survivor of them; *And* that in all

To devote his whole time, and not engage or be employed in any other business.

To take care of the goods committed to his charge.

To procure best sale, either for ready money or to persons of good credit.

In selling upon credit, to make inquiries whether the parties applying to purchase on credit are worthy to be trusted.

To minute result of inquiries.

Not to give longer credit than ——, or for a greater amount than £——, without consent of principals.

To act according to directions of principals.

In absence of

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special orders, to act for benefit of principals.

cases where he shall receive no special orders or directions, he will act in such manner as he shall judge to be most conducive to the advantage of the said [*principals*], and of the survivors and survivor of them, and of such person or persons as may be copartner or copartners in trade with them, or the survivors or survivor of them: AND ALSO, that he the said [*factor*] will, from time to time, account for and transmit to the said [*principals*]; or the survivors or survivor of them, all monies, bills, and securities for money, received from the sale of any ——, or other goods sold by the said [*factor*], as such factor or agent as aforesaid: AND ALSO, that he the said [*factor*] will, from time to time, in case he has assets in his hands, accept and duly pay all such bill and bills of exchange as may be drawn upon him by the said [*principals*], or the survivors or survivor of them, and of which he may receive due notice from them, or the survivors or survivor of them: AND ALSO will, from time to time, on the first day of every month, send and transmit to the said [*principals*], and to the survivors or survivor of them, a full, clear, and correct statement in writing, of all orders both taken and executed; and of all goods which may have come to his hands; and also of all such goods as he may have sold, to whom, and whether for ready money, or on credit; and likewise of all such other matters, transactions, and things, as in anywise concern the said agency business, and which may have taken place during the preceding month: AND ALSO, that he the said [*factor*] will keep books of account, in which shall be made plain and correct entries of all goods received from the said [*principals*], or the survivors or survivor of them, or from any person or persons who may be the copartner or copartners in trade with them, or the survivors or survivor of them, and also of all goods sold and delivered by him the said [*factor*], as such factor or agent as aforesaid, and also of all orders received and taken; and of all other matters, transactions. and things, in anywise concerning the said agency business: AND that he the said [*factor*] will, on the —— day of ——, and the —— day of ——, in each and every year, unless either of the said days shall happen on a Sunday, and in that case on the day following, accurately cast up and balance the said books of account, in order that the true state of the said agency business may clearly appear therefrom: AND FURTHER, that it shall be lawful for the said [*principals*], or the

To account for and transmit monies, &c. received to principals.

To accept principals' bills when he has assets in hand.

To transmit monthly account of affairs to principals.

To keep account books.

To balance account books every half-year.

Principals to have access to

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inspect the accounts, &c.

survivors or survivor of them, or any person or persons who may at any time be the copartner or copartners in trade of them, or the survivors or survivor of them, their respective executors and administrators, or any of them, at all seasonable hours in the day time, to have free access to the said books of account, and to all other books, papers, documents, and writings in anywise touching or concerning the said agency business; and to take copies of or extracts from the same or any of them; *And* which books of account, papers, documents, and writings, he the said [*factor*] will carefully preserve, (damages by fire and other inevitable accidents only excepted); and, upon the final settlement and winding up of the said agency business, will give and deliver up the same books, documents, and writings, undefaced and unobliterated, to the said [*principals*], or the survivors or survivor of them, his executors or administrators, AND THE SAID [*factor*], for himself, his heirs, executors, administrators, and assigns, doth hereby further covenant and agree with the said [*principals*], their respective executors, administrators, and assigns, that he the said [*factor*] will, out of the salary or wages hereinafter agreed to be paid to him, find and provide a clerk who writes a good hand, and understands accounts and book-keeping, for the purpose of constantly assisting him the said [*factor*] in the management of the said agency business: AND ALSO, that he the said [*factor*] will, out of such wages or salary, find and provide a porter for the purpose of assisting in the said business. AND THE SAID [*principals*], in consideration of the true and just performance of the covenants and agreements hereby entered into by the said [*factor*], for themselves jointly and severally, and for their several and respective heirs, executors, and administrators, do hereby covenant and agree with the said [*factor*], his executors, administrators, and assigns, in manner following; that is to say, that they the said [*principals*], their respective heirs, executors, and administrators, will and shall, yearly and every year, during so long as the said [*factor*] shall act as their agent or factor as aforesaid, pay or cause to be paid unto the said [*factor*], the wages or salary of £—— a year, of lawful British money; the said wages or salary to be paid and payable by even weekly payments; the first payment thereof to begin and be made on the —— day of —— next ensuing the date of these presents: AND ALSO, that in case

Account books to be carefully preserved.

Account books to be delivered to principals at end of term.

Covenant by factor to provide a clerk and porter out of his salary.

Covenant by principals to pay salary by weekly payments.

If factor sell

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such a quantity of goods, that commission at certain rate would amount to a larger sum than salary, then to pay such further sum as will make salary equal to what commission on goods sold would have amounted to.

the said [*factor*], as such factor or agent as aforesaid, shall sell and dispose of such a quantity of goods so that commission on [*particular goods*] at the rate of five pounds for every hundred pounds' worth thereof, and on all other goods at the rate of two pounds ten shillings for every hundred pounds' worth thereof, would amount to a greater sum than [*salary*] a year, then and in such case, they the said [*principals*] will at the end or expiration of every half-year, pay to the said [*factor*] such further sum as will make the said salary or wages of [*salary*] a year, equal to what commission at the rate aforesaid on the goods so sold, would have amounted to; *Nevertheless*, it is fully understood that such further sum is not to be paid on any bad debts, but only on the amount of the monies actually received and come to hand.

Commission not to extend to bad debts.

Agreement to permit factor to reside in rooms over warehouse, rent free.

AND THE SAID [*principals*] do further agree that the said [*factor*], during such time as he shall act as such factor or agent as aforesaid, shall and may, with his family and servants, reside in the dwelling-house with the appurtenances, over the said shop or warehouse, in —— street aforesaid, free from the payment of rent or taxes for the same:

To pay factor half-yearly all sums paid for carriage of goods, &c.

AND ALSO, that they the said [*principals*] will pay unto the said [*factor*], once every six months, all such sums of money as he may have paid or laid out, for or on account of books, paper, and stationery made use of in and about the said agency business; *And also* all such sums as he may have paid or laid down for the postage of letters relating to the said agency business; *And* for the carriage of goods, wares, and merchandizes sent to him by the said [*principals*], the survivors or survivor of them, or by any person or persons who may be copartner or copartners in trade with them, or the survivors or survivor of them.

Not to employ any other person as factor.

AND THE SAID [*principals*] do further agree with the said [*factor*], that they, and the survivors or survivor of them, will not employ any other person as a factor or agent in the vending of ——, within the city of London, during such time as the said [*factor*] shall act as such factor or agent as aforesaid.

Factor not to be answerable for involuntary losses.

PROVIDED NEVERTHELESS *and it is hereby agreed* between the parties hereto, that the said [*factor*] shall not be answerable for any loss or damage which may happen to any goods or merchandizes sent to him by any coach, waggon barge, or otherwise, before the same shall come to his hands or custody; or for any loss or damage which may happen to any goods or merchandizes which have actually come to his

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hands or custody, and which may be sent by the said [*factor*] to any customer by any porter, coach, waggon, barge, ship, or otherwise howsoever; nor for any other loss or damage which may happen to any of the goods and merchandizes committed to his charge or care, unless such loss or damage happen through his wilful neglect or default; or unless where any loss is stated to happen to any of such goods in the carriage thereof by any coach, waggon, barge, or ship, the said [*factor*] shall have neglected to book at the office of such coach, waggon, barge, or ship, the delivery of such goods or merchandizes. PROVIDED NEVERTHELESS, *and it is hereby agreed* between the parties hereto, that in case the said [*factor*] shall, at any time before the expiration of the said term of —— years, be desirous of giving up the said agency business, it shall be lawful for him so to do, upon giving six calendar months' previous notice in writing of such his intention to the said [*principals,*] or the survivors or survivor of them, or by leaving such notice at their or his usual places or place of abode. AND *it is also agreed,* that if the said [*principals*], or the survivors or survivor of them, shall at any time before the expiration of the said term of —— years, be minded and desirous to discharge the said [*factor*] from being such factor or agent as aforesaid, it shall be lawful for them or him so to do upon giving six calendar months' previous notice in writing of such intention, or upon leaving such notice at the shop or warehouse for the time being made use of by the said [*factor*] in the said agency business, anything herein contained to the contrary notwithstanding. AND *it is hereby covenanted and agreed* by and between the parties hereto, that if any dispute or difference shall at any time or times arise or happen between the said [*factor*] on the one part, and the said [*principals*], or any person or persons who may be copartner or copartners with them or the survivors or survivor of them, their respective executors or administrators, or any of them, on the other part, for or on account of any matter or thing herein contained which shall not within one calendar month after the same shall arise be fully decided between the parties in difference themselves, Then and so often, and in every such case, the matter of every such difference or dispute shall from time to time, upon the request of any of the parties in difference or dispute, be reduced into writing, and be referred to the hearing of three indifferent persons, to be chosen, one by

Power for factor to determine agreement on giving —— months' notice.

Power for principals to discharge factor, on giving —— months' notice.

Arbitration clause.

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the said [*factor*], his executors or administrators, another by the person or persons in difference or dispute with the said [*factor*], his executors or administrators, and a third by the two first persons so first chosen: AND such arbitrators to be accordingly chosen within the space of two calendar months next after such request as aforesaid: AND the award, order, and determination of the said three persons so to be chosen as aforesaid, or of any two of them, in the matters referred to them, shall be binding and conclusive upon the parties in difference, their respective executors and administrators; and shall be performed, observed, and kept by them accordingly: *Provided* such award, order, or determination be made in writing, under the hands and seals of the persons making the same, and ready to be shewn to the parties concerned, within the space of twenty-eight days next after the request of any such parties for that purpose:

Rule of Court.

AND for the better enforcing the performance and observance of every such award, the same shall from time to time be made a rule of her Majesty's Court of Queen's Bench, according to the statute in that case made and provided.

Power of attorney to factor to receive debts.

AND for the purpose of better enabling the said [*factor*] to receive and get in all debts and sums of money for or on account of any goods, wares, and merchandizes, which may be sold by him as such factor or agent as aforesaid, they the said [*principal*], by these presents, *Do* make, constitute, and appoint the said [*factor*] their true and lawful attorney, for them, and in their names or otherwise, and for their use, to ask, sue for, recover, and receive, all and every such sum and sums of money as shall or may be due or owing from any person or persons, for or on account of any goods or merchandizes sold by him as their agent or factor as aforesaid, and to give receipts and sufficient discharges for the same; *they* the said [*principals*] hereby ratifying and confirming all and whatsoever he the said [*factor*] shall lawfully do or cause to be done in and about the premises; and any attorney or attornies under him the said [*factor*] to substitute and appoint, and such substitution and appointment at pleasure to revoke (*a*). IN WITNESS &c.

(*a*) [As to the power of a factor to pledge the property of his principal. *Vide infra*, Vol. 5, p. 291 : *Phillips* v. *Huth*, 6 Mee. & W. 572 : and *Nicholson* v. *Hooper*, 4 Myl. & Cr. 179.]

49. [AGREEMENT *between* MERCHANTS *and a Person whom they agree to employ as their* AGENT *in an* AMERICAN COLONY. 49. MERCHANTS AND AGENT.

THESE ARTICLES OF AGREEMENT made and concluded this —— day of ——, 18—, BETWEEN [*merchants*], of &c., of the one part, and [*agent*], of &c., commercial agent, of the other part: WITNESS, that in consideration of the covenants hereinafter contained, on the part of the said [*agent*], the said [*merchants*] do hereby severally and respectively covenant and agree with the said [*agent*], his executors and administrators, That they the said [*merchants*] will hire and employ, and they do hereby accordingly hire and engage the said [*agent*], as their agent, to take care of, conduct, and manage a certain store or warehouse, belonging to them the said [*merchants*], situate in the British settlement called Prince Edward's Island, in the Town of Charlotte, otherwise called Charlotte's Town, in the said island of Prince Edward, in the Gulf of St. Lawrence, in North America, with full and free power and liberty to buy, sell, barter, or exchange any merchandize, stock, cattle, timber, colonial produce, manufactures, corn, hay, or any other article the said [*agent*] may deem or consider profitable to the interest and benefit of the said [*merchants*], from the —— day of ——, now next ensuing, for and during the term of —— years; *And* that they the said [*merchants*] will, during the said term of —— years, in consideration of the services of him the said [*agent*], pay and allow unto him the said [*agent*] the annual salary of £——, by equal quarterly payments on the —— day of —— &c., in each and every year, and will make the first payment of the said annual salary on the —— day of ——, next ensuing the date of these presents, and will make all such payments free from and without any deduction or abatement whatsoever; AND FURTHER, that he the said [*agent*] shall be allowed a commission of £5 per cent. on all sales above the sum of £—— per annum, which he the said [*agent*] may make or effect, for or on behalf of the said

Parties.

Testatum.

Engagement of agent

for a fixed term.

Salary.

Commission on sales beyond a certain value.

49. MERCHANTS AND AGENT.

Additional salary in lieu thereof, if sales fall short of a certain amount.

[*merchants*], in addition to his said annual salary of £——: AND FURTHER, that if after the expiration of the said first year of the said term of —— years, the sales to be effected by the said [*agent*] shall not produce more than the sum of £——, They the said [*merchants*] do hereby further agree to pay and allow unto the said [*agent*] during the remainder of the said term of —— years, as a remuneration for his exertions, the annual salary of £——, in addition to the aforesaid annual sum of £——, to be paid and payable at the same times, and in the same manner as is hereinbefore appointed and provided for payment of the said annual salary of £——; *And* which annual salary or salaries, and per centage, he the said [*agent*] shall and may be at liberty to deduct and retain, by and out of the first monies which shall come to the hands of or be received by him: AND FURTHER, that they the said [*merchants*], will, at their own proper costs and charges, find and provide for the said [*agent*], all kinds of goods, wares, merchandizes, and other articles and things of every nature and description whatsoever, which he may demand or deem requisite for the carrying on and conducting the said store or warehouse, or otherwise in the execution, conduct, or management of his office as such agent as aforesaid, so as he may be enabled to effect sales, and manage, conduct, and carry on the said store or warehouse to the greatest advantage and benefit of the said [*merchants*]: AND FURTHER, that the said [*agent*], and his wife, family, and servants, shall and may be at liberty to reside in and have the use and occupation of the messuage, tenement, and dwelling-house, and all other the messuages or tenements and premises, with the appurtenances, now the property and estate of them the said [*merchants*], which adjoin or belong to the said store or warehouse, without paying any rent for or in respect of the same; and which messuage, tenement, or dwelling-house, they the said [*merchants*] hereby undertake and agree, by and at their own costs and charges, to furnish, with suitable household and other furniture of every nature and description whatsoever, to the approbation of the said [*agent*]; *And also* that they the said [*merchants*] will, at their own proper costs and charges, find and provide the said [*agent*] with suitable assistants, servants, and workmen, to be under and assist him the said [*agent*] in the business of the said store or warehouse, and in and about the exercise of his office, as agent to them the said [*merch-*

Agent may retain salary.

Merchants to supply goods, &c.

Agent may reside in adjoining house with his family without paying rent.

Merchants to furnish house.

Merchants to provide clerks, &c.

ants]; *And* that they the said [*merchants*] will find and provide the said [*agent*], and his wife, family, and servants, and all servants and workmen, both male and female, who may be so as aforesaid employed by the said [Z. P.] to assist under him, with suitable board and lodging, and every necessary or incident thereto; *And* that all such sum and sums of money, costs, charges, and expenses which may be incurred or sustained in the providing of such board and lodging, and also in the payment of all assistants, servants, workmen, and other persons' wages who may be employed for the purposes aforesaid, he the said [*agent*] shall be at liberty to deduct, retain, and reimburse by and out of the first monies which shall come to his hands; *And moreover*, that they the said [*merchants*] will, at their own costs and charges, convey the said [*agent*], and his wife, family, and servants, and any household, or other furniture, goods, chattels, property, or effects which he the said [Z. P.], or his family or servants, may think proper to take with them to the said island: PROVIDED ALWAYS, and it is hereby declared and agreed to be the true intent and meaning of these presents, and of the said parties hereto, that in case the said [*agent*] should not approve of the situation as agent to the said [*merchants*] in the said island, or in case the climate should not agree with the health of himself or family, he the said [*agent*] shall and may, upon giving notice in writing unto them the said [*merchants*], be at liberty to give up his employment as such agent as aforesaid, and to return to England, and then, and in such case, these presents, and every covenant, clause, article, matter and thing herein contained shall cease, determine, and be utterly void, to all intents and purposes, any thing to the contrary thereof in anywise notwithstanding; *And* the said [*merchants*] do hereby for themselves, severally and respectively, and for their several and respective executors and administrators, covenant and agree with the said [*agent*], that in case the said [*agent*], shall not approve, (*&c. as in the preceding proviso*), They the said [*merchants*] will, upon the expiration of such notice, so to be given as aforesaid, at their own proper costs and charges, reconvey the said [*agent*], and his wife, family, and servants, and any goods, chattels, property, or effects they may think proper to bring back again with them, to the port of London: AND THIS INDENTURE FURTHER

49. MERCHANTS AND AGENT.

Merchants to provide board and lodging for agent's family, clerks, &c.

Agent to deduct expenses.

Merchants to send out agent with his family and goods at their expense.

Agent may determine agreement on giving notice.

Covenant by merchants to bring agent and family and goods home, in case agreement is determined.

Covenant by

49. MERCHANTS AND AGENT.

agent to act diligently and faithfully during term.

WITNESSETH, that in consideration of the covenants hereinbefore contained on the part of the said [*merchants*], he the said [*agent*], for himself, his executors, and administrators, doth hereby covenant and agree with the said [*merchants*], their executors, administrators, and assigns, *That* he the said [*agent*] will, during the said term of —— years, if he shall so long live, well, diligently and faithfully, to the utmost of his power, serve the said [*merchants*], as their agent, and take upon himself the care, conduct, and management of their said trade of merchandizing at the said store or warehouse; *And*, that he, the said [*agent*], will, at all times during the said term, receive and take into his care and custody, all such goods and merchandizes whatsoever as aforesaid, and as by or for the use, or on the account of them the said [*merchants*] shall be conveyed or sent to him the said [*agent*], *And* will sell, barter, and dispose of the same goods and merchandizes to the best profit he can for the said [*merchants*], their executors, administrators, and assigns; *And also* will, at all times during the said term, follow and perform the advice, direction, and orders of them the said [*merchants*], which shall, by letters or otherwise, be sent, given, or made known to him the said [*agent*], concerning the said store or warehouse and merchandizes as aforesaid; *And also*, that the said [*agent*] will, at the costs of the said [*merchants*], their executors, administrators, or assigns, provide and keep in good order, books of account, concerning his employment as such agent as aforesaid, according to the custom of agents to merchants in such cases: *And* will deal justly, truly, and faithfully to and with the said [*merchants*], their executors, administrators, and assigns, in all and every his accounts, reckonings, bargains, and dealings, relating to and concerning his said employment as such agent as aforesaid; *And* will constantly, once in every year during the said term of —— years, determinable as aforesaid, transmit and send unto the said [*merchants*], their executors, administrators, and assigns, true accounts of all the business and dealings of him the said [*agent*] in the premises; *And also* will send letters of advice to the said [*merchants*], their executors, administrators, and assigns of all such measures and occurrences wherewith it shall be proper and expedient that they the said [*merchants*] be acquainted; *And also*, that he

To receive goods, and dispose of goods.

To obey directions of principals.

To keep books of account.

To deal justly.

To transmit accounts annually.

To advise principals of all important matters.

To produce

the said [*agent*] will, from time to time, upon every reasonable request of the said [*merchants*], shew forth and produce to them, or either of them, all his books of account, concerning all such his dealings aforesaid, and make and give unto the said [*merchants*], their executors, administrators, or assigns, a just and perfect account of and concerning all and every such goods, wares, money, and merchandizes of them the said [*merchants*], which shall hereafter come to the hands and charge of him the said [*agent*], or for which he should or ought to be accountable to the said [*merchants*], their executors, administrators, or assigns; *And moreover*, that he the said [*agent*] will, within —— months after such annual account shall be made or given in, well and truly satisfy and deliver over unto the said [*merchants*], their executors, administrators, or assigns, all and every such wares, money, goods, merchandizes, and other effects and things, as by such account shall appear to be due to them the said [*merchants*] from him the said [*agent*]. IN WITNESS &c.]

49. MERCHANTS AND AGENT.

books of accounts, and render accounts on request.

To render goods or monies due.

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50. [AGREEMENT, *under Seal, for the* EXCLUSIVE PRIVILEGE *of* SELLING *a* PATENT MEDICINE *in the* UNITED KINGDOM, *for* TWENTY-ONE *Years*, DETERMINABLE *at the End of the first Seven or Fourteen Years.*

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

ARTICLES OF AGREEMENT indented and made this —— day of September, 1830, BETWEEN [*proprietor*], of &c., for himself, his heirs, executors, and administrators, of the one part, and [*agents*], of &c., druggists, for themselves, and the heirs, executors, and administrators of them and each of them, of the other part.

Parties.

FIRSTLY, That the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns, shall be and are hereby appointed the sole wholesale vendors, for the term of twenty-one years, from the date hereof,

Appointment of agents for seven years.

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

(but determinable as hereinafter is mentioned (*a*)), of a certain medicine or composition, called ——, whereof the said [*proprietor*] is now the sole proprietor or owner.

Proprietor to supply medicine during the term, at certain prices.

SECONDLY, That the said [*proprietor*], his executors, administrators, or assigns, shall sell to and supply the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns, with the said medicine or composition, and deliver the same free of expense, during the continuance of the said term, in such quantities, [not being of less amount at one time than £100 in value], with proper directions, and in every way ready for sale, as shall from time to time be required, and of the same quality as the same hath been hitherto composed, at the rates or prices following; (that is to say), the larger packets at ——*s.* per dozen for such as have been usually sold wholesale at ——*s.* per dozen, and to the public at ——*s.* per pot, and the smaller size at ——*s.* per dozen for such as have been usually sold wholesale at ——*s.* per dozen, and to the public at —— pence per pot, all stamp duty on each included (*b*).

Perpetual agency.

(*a*) [If the agreement is for a perpetual agency, say,

"FIRSTLY, That in consideration of £——, already paid by the said [*agents*] to the said [*proprietor*], the said [*agents*], and the survivor of them, their executors or administrators, and their or his assigns, shall be and are hereby nominated, constituted, and appointed the sole and irrevocable perpetual agents of him the said [*proprietor*], his executors, administrators, and assigns proprietors of the said medicine or composition called ——, for the selling, publishing, and distributing the said medicine or composition," (*proceeding as in the text mutatis mutandis*).]

Agents to be entitled to engraved plate.

(*b*) [If the agreement is for a perpetual agency, it may be added;—

"THAT the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns, shall be entitled to the sole property in, and to all advantages arising from the engraved plate respecting or relating to the said medicine or composition, now or late in the possession of her Majesty's Commissioners of Stamps at Somerset House, and to all the impressions therefrom now existing or hereafter to be taken; and in case the said plate shall have been

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

THIRDLY, That in case any of the said medicine or composition so to be supplied as aforesaid, shall become spoiled and unfit for sale in any other manner than by breakage, the said [*proprietor*], his executors, administrators, or assigns, shall exchange the same for a like quantity, in a good and saleable condition.

To replace spoiled medicine.

FOURTHLY, that the said [*proprietor*] hath full right to grant the exclusive privilege hereby conferred, and to enter into the agreements herein contained; and that he, his executors, administrators, or assigns, shall not at any time during the said term sell or supply unto any person or persons whomsoever other than as aforesaid, any of the said medicine or composition under its present name or appellation, or by any other name, without the consent in writing of the said

Proprietor not to supply medicine to other persons.

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destroyed or become unless, that they or he respectively shall be at liberty to substitute a new one."

"THAT in case of the refusal or neglect of the proprietor or proprietors for the time being, of the said medicine or composition, to supply the same to the said [*agents*], or the survivor of them, his executors, or administrators, or their or his assigns, agreeably to the second article hereof, it shall be lawful for the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns, to make and compound so much of the said medicine or composition as they or he may have occasion to sell or dispose of, agreeably and in conformity to the original recipes of the said medicine, deposited with the said [*agents*], upon the execution of this indenture, and which recipe shall remain in the custody of the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns."

If proprietor neglect to supply medicine, agents may compound it.

"THAT the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns, shall not in any case divulge, publish, or make known, either directly or indirectly, the contents of the said original recipe, or the manner of making or preparing the said medicine or composition, nor shall they or he make any use of the said recipe, except in case of some or one of the events happening, which are provided for by the last preceding article."

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

[*agents*], or the survivor of them, his executors, administrators, or assigns, first had and obtained, save and except as in the next article is mentioned.

except in specified places.

FIFTHLY, That the said [*proprietor*] shall be at liberty to sell the said medicine or composition to any person or persons residing in any of the following places; that is to say, ——, in the county of ——; —— in the county of ——; and ——, in the county of ——, at the prices hereinbefore mentioned as the wholesale prices of the said medicine or composition (*c*).

Proprietor to make declaration as to quality of medicines.

SIXTHLY, That the said [*proprietor*], his executors, administrators, or assigns, shall, at the expense of the said [*agents*], or the survivor of them, his executors, administrators, or assigns, whenever so required during the said term, verify by his solemn declaration to be made in pursuance of the statute passed for that purpose, that the said medicine or composition so to be supplied as aforesaid, is of the same goodness, quality, and composition as that of the same name which hath hitherto been prepared and sold to the public (*d*).

(*c*) [*Or*, "that the said [*proprietor*] shall be at liberty to sell the said medicine or composition by retail only, and at the full retail prices, at his usual place of business for that purpose in London, but shall, for that purpose, purchase the same from the said [*agents*], or the survivor of them, his executors, administrators, or assigns, at the usual wholesale price."]

(*d*) ["And that such declaration shall be to the following purport or effect; (that is to say), That having appointed [*agents*] sole and exclusive agents for the sale of the genuine ——, and in order that the said medicine or composition might be rendered more secure from spurious imitations, the party or parties making the declaration had duly authorised the said [*agents*], or the survivor of them, his executors or administrators, or their or his assigns, to affix the stamp containing their names and address to each bottle of the said medicine; and that no medicine but that sold by the said [*agents*], or the survivor of them, his executors or administrators, or their or his assigns, was genuine; which

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

Advertisements &c. to be in agent's name.

SEVENTHLY, That the style and firm of [*name of agent's firm*] only shall appear and be made use of in all advertisements, bills, and other publications for promoting the sale of the said medicine or composition as the only wholesale vendors in Great Britain and Ireland, to the exclusion of all other names.

Mode of payment.

EIGHTHLY, That on delivery of each parcel of the said medicine or composition to the said [*agents*], or the survivor of them, his executors or administrators, their or his assigns in pursuance of an order for the same, [no order being for a less amount than one hundred pounds' worth as aforesaid], the said [*agents*], or the survivor of them, his executors or administrators, their or his assigns, shall pay the said [*proprietor*], his executors, administrators, or assigns, for the quantity of the said medicine or composition so delivered, after the rate mentioned in the second article hereof by a bill of exchange, payable in six months after such delivery, or shall, at the option of the said [*agents*], or the survivor of them, his executors or administrators, and their or his assigns, pay for the same in cash at the time of such delivery, deducting from the amount thereof a discount of £5 in the hundred.

Certain expenses to be borne by proprietor.

NINTHLY, That all such expenses as shall be incurred by the said [*agents*], or the survivor of them, his executors, administrators, or assigns, in advertising and making public the said medicine or composition, according to the direction of the said [*proprietor*], shall be allowed and deducted from time to time as cash, and allowed in the settlement of accounts between the parties (*e*).

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original declaration shall be delivered to the said [*agents*], or the survivor of them, his executors or administrators, or their or his assigns, who shall be at liberty to print copies thereof to be delivered with each bottle of the said medicine or composition."]

Advertisements to be mutually agreed up and expenses divided.

(*e*) [*Or*, "THAT all orders for advertising the said medicine or composition shall be mutually agreed upon, in writing, between the said parties, and that the expenses incurred on that account shall be borne between the said parties, in equal moieties, and allowed for on the settlement

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

Agents to sell medicine to all persons.

TENTHLY, that the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns, shall, during the continuance of the said term, sell and supply the said medicine or composition to all such persons in the United Kingdom and elsewhere, with whom they now or may hereafter deal, who shall apply for the same, and who shall conform to the general regulations amongst the wholesale medicine dealers.

Agents not to sell any imitation medicine, or other medicine of the same name.

ELEVENTHLY, That the said [*agents*], nor the survivor of them, his executors or administrators, and their or his assigns, shall not, at any time or times during the continuance of the said term, sell or supply any medicine or composition whatsoever, as an imitation or pretended improvement of the said medicine or composition, nor any of the same name, except such as shall be bought of the said [*proprietor*], his executors, administrators, or assigns, in manner aforesaid.

All stamps to be in agents' name.

TWELFTHLY, That as a security to prevent the said medicine from being counterfeited or imitated, the name, firm, and style of [*agent's firm*] shall be inserted in all the stamps or labels used in the sale of the said medicine or composition, and none of it shall be sold unless such stamp be affixed thereto.

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of accounts, upon that footing, to each party who shall produce to the other vouchers for the same."

£100 to be expended in advertising during first year.

"THAT the amount of expenditure for advertising the said medicine, during the first year of this agreement, shall not be less than £100, but that the amount thereof afterwards shall be mutually agreed upon, as in the last article."]

[The following clause may be inserted or not according to the intention.

Allowance for goods returned.

"THAT the amount of any of the said medicine which may have been sent by the said [*agents*], or the survivor of them, his executors or administrators, or their or his assigns, to any vendor or vendors, upon sale or return, who may not have received or ordered a second supply thereof, and who may not have accounted for the same, shall from time to time be deducted as cash, and allowed to the said [*agents*], or the survivor of them, his executors or administrators, and their or his assigns, in hte settlement of accounts."]

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

Accounts to be settled annually.

Principle on which accounts are to be settled.

THIRTEENTHLY, That all accounts between the said parties, concerning the said medicine or composition, shall be annually settled between them, up to the 31st day of December in every year, and the balance of such accounts paid by a bill of exchange, at two months from that period, first deducting all such monies as shall have been paid by the said [*agents*], and the survivor of them, his executors or administrators, and their or his assigns, under the direction of the said [*proprietor*], for advertisements, hand-bills, carriage, and other expenses, and deducting the value of such quantities of the said medicine or composition as shall have been sent to such vendors who have not received or ordered a second supply, or shall have been sent to country dealers, and returned unsold.

Proprietor to indemnify agents against costs of defending the title to medicine, &c.

FOURTEENTHLY, That the said [*proprietor*], his executors, administrators, or assigns, shall at all times hereafter well and sufficiently save harmless, and keep indemnified, the said [*agents*], and the survivor of them, his executors, or administrators, and their or his assigns, of, from, and against all manner of actions, suits, bills, plaints, attachments, or prosecutions, of what nature or kind soever, either at law or in equity, or otherwise howsoever, which shall or may be brought, commenced, or presented against them, any or either of them, and also from and against all costs, charges, damages, and expenses which they or any of them may in any wise bear, pay, or be put unto, in defending and settling the same, in consequence of their advertising, publishing, or selling the said medicine or composition, as being prepared by or as the property of the said [*proprietor*], his executors, administrators, or assigns, or for or in respect of any matter or thing in relation to the said medicine or composition.

Liquidated damages.

FIFTEENTHLY, That in case of breach or non-performance hereof, by any of the said parties his or their executors, administrators, or assigns, the party or parties so breaking or neglecting to observe the same shall forfeit and pay unto the other party or parties the sum of £200, as liquidated damages, and not in the nature of a penalty.

Proviso for determining agency at the end of the first

SIXTEENTHLY, That the above-mentioned term of twenty-one years may be determined at the expiration of seven years or of fourteen years from the date hereof, upon notice

50. EXCLUSIVE AGENCY FOR A PATENT MEDICINE.

in writing being given by or to the said [*proprietor*], to or by the said agents, or the survivor of them, his executors or administrators, or their or his assigns, three calendar months before the expiration of such seven or fourteen years from the date hereof. IN WITNESS &c.]

seven or fourteen years.

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51. PURCHASE OF SECRET OF MEDICINE.

51. [AGREEMENT *for the* ABSOLUTE PURCHASE *of the* SECRET *and sole* RIGHT *of compounding and vending a* MEDICINE, *in consideration of a* MOIETY *of the* PROFITS *to be paid during* TWELVE YEARS.

Parties.

ARTICLES OF AGREEMENT indented, made, and entered into this —— day of ——, BETWEEN [*proprietor*], of &c., of the one part; and [*purchasers*], of &c., under the firm and style of ——, of the other part, for the due observance whereof the said parties bind themselves, and the heirs, executors, and administrators of them and each of them, to the other and others of them, and his and their executors and administrators.

Sale of interest in medicines.

FIRSTLY, The said [*proprietor*], for the considerations hereinafter mentioned, hereby grants and assigns unto the said [*purchasers*] all and singular the right and interest of him the said [*proprietor*], of and in certain medicines or preparations called respectively ——, whereof the said [*proprietor*] is the sole proprietor and owner.

Proprietor to disclose secret by writing of even date.

SECONDLY, That the said [*proprietor*] shall in a certain paper writing under his own hand, and bearing even date herewith, set forth full, true and perfect recipes for the making up or compounding the aforesaid medicines or preparations respectively.

Not to disclose secret to other persons.

THIRDLY, That the said [*proprietor*] shall not at any time hereafter disclose or make known to any person or persons whomsoever, the said receipt whereby the said medicines or preparations, or any of them, may be compounded or made up.

51. PURCHASE OF SECRET OF MEDICINE.

Not to compound medicines.

FOURTHLY, That the said [*proprietor*] shall not at any time hereafter, either by himself or by an agent or otherwise, make up or compound the aforesaid medicines or preparations, or any other of the same description, *And* shall not permit or allow the same or any of them to be made up or compounded by any person or persons whomsoever, under or by virtue of any license or authority by him the said [*proprietor*] heretofore given or granted, or by him to be hereafter given or granted.

Purchasers to pay a moiety of profits to proprietor.

FIFTHLY, That in consideration of the aforesaid articles the said [*purchasers*] shall pay to the said [*proprietor*] annually one moiety of the net profits arising from the sale of the aforesaid medicines or preparations during the term of twelve years, after which term the said [*purchasers*] shall be entitled to hold the proprietorship of the said medicines and preparations without account.

To render account annually.

SIXTHLY, That the said [*purchasers*] shall, during the said term of twelve years, render to the said [*proprietor*] annually, on the —— day of ——, a statement and account of the sale of the said aforesaid medicines or preparations, together with the cost of preparing the same, and the cost of advertising and publishing the same, whereby the net profit arising from the sale of the medicines or preparations may be ascertained.

As to expenses of advertising.

SEVENTHLY, That the expense of advertising and publishing the said medicines or preparations during the said term shall not be greater or otherwise than the sum to be agreed on between the said [*purchasers*] and the said [*proprietor*] by a memorandum in writing.

Proprietor's share of profits to be paid within fifteen days after rendering account.

EIGHTHLY, That within fifteen days after the rendering the account mentioned in the sixth article, the said [*purchasers*] shall pay to the said [*proprietor*] the share or proportion of the net profit due to him on the said account.

Purchasers not to verify accounts.

NINTHLY, That the said [*proprietor*] shall not be entitled to call upon the said [*purchasers*] to produce books in order to verify or prove the accounts to be rendered by them in pursuance of the sixth article, but the said accounts so rendered shall be taken and held correct without further proof.
IN WITNESS &c.]

52. ASSOCIATION FOR PROSECUTING FELONS.

52. AGREEMENT *for regulating an* ASSOCIATION *for* PROSECUTING FELONS, &c. (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, in the year 18—; BETWEEN the several persons whose names are or shall be subscribed and seals affixed to these presents, of the one part; and [*treasurer and solicitor*], of &c., of the other part.

Recital of situation of parties.

WHEREAS the several persons parties hereto, of the first part, are inhabitants of, or owners or occupiers of lands within the town of ——, situate in the county of ——

Agreement to form association.

NOW THIS INDENTURE WITNESSETH, that the said several persons parties hereto, of the first part, hereby agree to form themselves into an association for the prosecution of felons and persons guilty of theft, and other crimes and offences within [*intended limits*]; AND to give the several rewards hereinafter mentioned, in respect of the following offences; that is to say *The* sum of five guineas to any person or persons who shall, during the term of seven years from the date hereof, discover and give evidence of any robbery on the highway, within the said ——; or of breaking or entering any dwelling-house, or any barn, stable, or other building within ——, and stealing, or with an intent to steal, any thing thereout; or of stealing any sheep, horse, cattle, or pig, within the same limits; or of setting fire to any dwelling-house, barn, stable, or other building; or to any stack or rick of grain, hay, straw, or fodder, within the same limits; or of maliciously killing or maiming any cattle belonging to any or either of the persons parties hereto of the first part, and being within the limits aforesaid; *And also* the sum of three guineas to any person or persons who shall discover and give evidence against any person or persons who shall, during the time aforesaid, and within the limits aforesaid, steal any grain, hay, fowls, household goods, imple-

Scale of rewards.

(*a*) [This precedent is preserved, because its provisions may be useful as a guide in framing deeds for regulating societies whose objects may be of a less dangerous and oppressive tendency than that mentioned in the text.]

ments or utensils of trade or husbandry, belonging to all or any of the parties hereto of the first part; or be guilty of milking any cow, or of robbing any court-yard, garden, orchard, or field; or of cutting down any timber-tree or trees, grove, or plantation, of or belonging to all, any, or one of the persons parties hereto of the first part: *And also* the sum of ten shillings and sixpence to any person who shall discover and give evidence against any person, who within the limits aforesaid shall steal any peas, turnips, or potatoes, of or belonging to all, any, or one of the persons parties hereto of the first part; or shall be guilty of breaking any hedges, gates, stiles, posts, poles, pales, or rails; or of stealing any hooks or eyes, or any timber, boards, quarters, or offal-wood, which shall be the property of any or either of the persons parties hereto of the first part, and within the limits aforesaid; *Such* rewards to be paid on the conviction of the offenders respectively, in addition to the rewards (if any) allowed by act of Parliament: *And* to contribute towards the same rewards and the expense of prosecuting such felons, thieves, and offenders, in equal proportions; *And* to observe the several articles, rules, orders, and regulations hereinafter contained; that is to say,

52. ASSOCIATION FOR PROSECUTING FELONS.

Rewards to be paid on conviction.

To contribute towards expenses in equal proportions.

FIRST, the said association shall continue seven years, to commence and be computed from the —— day of ——, and fully to be complete and ended.

Association to continue for seven years.

SECONDLY, the affairs of the association shall be under the conduct, regulation, and management of a committee of —— persons, or any —— of them, to be chosen from the members for the time being of the same association: *Such* committee shall be elected by ballot at a meeting of the subscribers, to be held at ——, on the —— day of ——, in every year: THE committee for the time being, or the major part of them, shall have power to supply any vacancy in their number by death or removal, or refusal to act; THE adjudication of all rewards, and the conduct and direction of all prosecutions, and the settlement of the accounts relating thereto: AND the right of making calls on the subscribers for the time being, of money to be paid to answer such rewards and to defray the expenses of such prosecutions, shall be in the discretion and wholly under the control of the committee for the time being, or the major part of them:

Committee to manage affairs of association.

To be elected by ballot.

To supply vacancies.

Adjudge rewards.

Direct prosecutions.

Make calls for money.

52. ASSOCIATION FOR PROSECUTING FELONS.

Calls to be answered in one month.

Subscribers to contribute equally.

Money to be paid to treasurer.

To be applied as committee direct.

Solicitor to conduct all prosecutions.

Subscribers to be entitled to have prosecutions for offences on their persons or property carried on by association.

Power to committee to carry on prosecutions for poor persons.

Subscribers not to be members when they cease to be inhabitants, or to be owners or occupiers.

Subscribers to be discharged from liability at their death.

Treasurer and solicitor to be

EACH and every call which shall be made by the said committee, or the major part of them, shall be answered and paid by the members respectively within one calendar month after notice to them respectively of the same call: AND each subscriber shall contribute and pay an equal proportion, according to the number of subscribers, towards all money which shall be called for to answer and pay such rewards, or to defray the expenses of prosecutions and all other incidental expenses: THE money which shall be called for from time to time shall be paid to the treasurer for the time being of the said association; *And* shall be applied and paid by him in such manner, and to such persons as the committee for the time being, or the major part of them, shall direct. ALL prosecutions which shall be conducted on the account, and at the expense of the said association, shall be solicited and carried on by the solicitor for the time being of the said association: AND every subscriber shall be entitled to have every prosecution for any offence which, during the said seven years, shall be committed on his person or property within the limits aforesaid, and which he or she shall be duly bound to prosecute, carried on by the solicitor for the time being of the said association, at the expense of the same association, under the direction and control of the committee for the time being of the said association, or the major part of them: AND the committee for the time being, or the major part of them, shall have full power to undertake any other prosecutions for offences committed within the limits aforesaid, at the expense of the said association, in those instances in which the poverty or situation of the persons on whose persons or property the offences shall be committed, shall render it expedient that the offender or offenders shall be punished at the expense of the said association: EACH and every subscriber shall cease to be a member of the said association from the time he or she shall cease to be an inhabitant, and also, not being an inhabitant, to be an owner or occupier of lands within the limits aforesaid: AND each subscriber shall be discharged from his or her engagement herein contained on his or her death, so as not to impose any obligation on his or her heirs, executors, or administrators, for or in respect of any offences to be committed subsequently to his or her death: A treasurer and solicitor to the said association shall be chosen once in every year by ballot, by the major part of

52. ASSOCIATION FOR PROSECUTING FELONS.

the members who shall be present at a meeting to be held at ——, on the —— day of ——: The same person may be chosen treasurer and solicitor, or a different person may be chosen to each of these offices: No treasurer or solicitor shall be eligible on any committee: In case of a vacancy in the office of treasurer or solicitor, either by death or any other cause, within any year, such vacancy may be supplied for the remaining part of the year by the committee for the time being, or the major part of them: The said [*treasurer or solicitor*] shall be treasurer and solicitor for the said association for the first year: The treasurer, shall produce his accounts from time to time to the committee, or the major part of them: And at the end of every year, or on any other election of a new treasurer, the preceding treasurer, or his heirs, executors, or administrators, shall pay to the succeeding treasurer the balance of the money in hand, as the same balance shall be settled and ascertained by the said committee for the time being, or the major part of them; and the account so stated shall be paid, and such payment be a good discharge: No account settled or allowed by the committee for the time being or the major part of them, shall be afterwards opened or questioned: And all calls made by such committee, or the major part of them, shall be duly answered, without any right to question the expediency or necessity of the same. And *each and every* of the several persons, parties hereto of the first part, *doth* hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only his and her own respective acts, deeds, and defaults, covenant, declare, and agree to and with the said [*treasurer and solicitor*], his executors and administrators, *In trust* for the persons who for the time being shall be the members of the said association; That they the said several persons, parties hereto of the first part, and their respective executors and administrators, will and shall, from time to time, and at all times during the said term of seven years, if they should so long continue members of the said association, pursuant to the rules and regulations hereinbefore contained, or for any shorter time during which they shall continue such members, observe, perform, fulfil, and keep all and singular the articles, stipulations, and agreements hereinbefore contained, to be observed, performed, fulfilled, and kept by them respectively: And make all such payments as

chosen by ballot yearly.

Same person, or different persons, may be chosen.

No treasurer or solicitor to be on committee.

Vacancy of treasurer or solicitor in interim of year to be supplied for remainder by committee.

First treasurer and solicitor.

Treasurer to produce accounts to committee.

Preceding treasurer to pay balance to succeeding treasurer.

No account settled by committee to be questioned.

Calls for money to be answered without inquiry.

Covenant by subscribers, with treasurer,

in trust for subscribers, to observe regulations.

To make pay-

52. ASSOCIATION FOR PROSECUTING FELONS.

ments to treasurer, subject to disposition of committee;

and observe all other rules.

ought to be or shall be required to be made, pursuant to such calls as aforesaid of the said committee for the time being or the major part of them; and make such payments respectively to the treasurer for the time being of the same association, subject to the order, control, and disposition of the committee for the time being of the said association, or the major part of them; AND that they respectively will and shall, in all other respects, conform to, observe, perform, fulfil, and keep, all and singular the rules and regulations hereinbefore contained. IN WITNESS &c.]

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53. TO BUILD A HOUSE, &c.

53. AGREEMENT *to* BUILD *a House, &c., the Materials to be provided by the Builder.*

ARTICLES OF AGREEMENT made and entered into the —— day of ——, 18—; BETWEEN [*builder*], of &c., of the one part; and [*proprietor*], of &c., of the other part.

Parties.

Covenant to erect buildings according to plan.

FIRST, the said [*builder*], doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said [*proprietor*], his executors, administrators, and assigns, that he the said [*builder*], his executors or administrators, will or shall, for the considerations hereinafter mentioned, within the space or time of six calendar months from the date of these presents, erect, build, and completely cover in and finish upon the premises of the said [*proprietor*], at —— aforesaid, a dwelling-house and buildings according to the plan and elevation set forth in the schedule hereunder written: AND ALSO do, perform, and execute, or cause and procure to be done, performed, and executed, all and singular the works also mentioned in the schedule hereunder written, according to the plan and elevation therein mentioned or contained, the same to be done within the time aforesaid, and in a good, workmanlike, and substantial manner (*a*): AND ALSO will or shall find and pro-

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(*a*) "to the satisfaction of [*surveyor* or *architect*], of &c.,

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vide such good, proper, and sufficient materials, of all kinds whatsoever, as (*b*) shall be proper and sufficient for erecting the said dwelling-house and buildings, and completely finishing the said works. [AND IT IS FURTHER AGREED by and between the said parties, that if the said [*builder*], his executors or administrators, should in any manner neglect, or be guilty of any delay whatsoever, in building and completely finishing the said dwelling-house, buildings, and works as aforesaid (*c*); and the said [*proprietor*] should give or leave notice in writing of such neglect or delay at the place of abode of him the said [*builder*], his executors or administrators, and the said [*builder*], his executors or administrators, should not (*d*) proceed to complete the said buildings and works, within the space of seven days after such notice given or left as aforesaid, *Then,* and in any such case, it shall be lawful for the said [*proprietor*], his executors or administrators, to purchase proper and sufficient materials, *And also* to employ a sufficient number of workmen, to finish and complete the said dwelling-house, buildings, and works; *And also* that the said [*proprietor*], his executors, administrators, or assigns, shall and may deduct and retain to himself and themselves the costs of such materials, and all such sum and sums of money as he or they shall pay to such workmen, for the completion of such dwelling-house, buildings, and works, out of the money which shall be due to the said [*builder*], his executors or admini-

On builder's default, proprietor to finish the works, and to deduct the expenses.

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or any other surveyor whom the said [*builder*] and [*proprietor*] shall for that purpose, by some writing under their hands appoint; to be testified by a writing or certificate under the hand of the said [*surveyor or architect*], or such other surveyor as aforesaid:"

To the satisfaction of a mutual surveyor or architect.

(*b*) "together with and in addition to the materials now lying on the said premises,"

Old materials to be used.

(*c*) and the said [*surveyor or architect*], or such other surveyor or architect as aforesaid, shall certify the same by writing under his hand;" *

Certificate of surveyor or architect.

(*d*) "according to the direction of the said [*surveyor or architect*], or such other surveyor as aforesaid,"

Direction of surveyor or architect.

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* [See *Morgan* v. *Birnie*, 3 Moo. & Sc. 76, *infra*, p. 681.]

53. TO BUILD A HOUSE, &c.

strators, under this agreement (*e*); *And also* that the said [*builder*], his executors or administrators, will not nor shall in any manner do or cause, or procure to be done, any act, matter, or thing whatsoever, to prevent, hinder, or molest the said [*proprietor*], his executors, administrators, or assigns, or any person or persons employed by him or them, from completing and finishing the said dwelling-house, buildings, and works, in manner aforesaid; or in using the materials which shall be on the said premises, and provided by either of the said parties for the doing thereof.] AND THE SAID [*proprietor*] doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree, with and to the said [*builder*], his executors and administrators, that he the said [*proprietor*], his executors or administrators, will or shall well and truly pay (*f*), or cause to be paid unto the said [*builder*], his executors, administrators, or assigns, the sum of £—— of lawful British money (*g*), within —— days, (*or* months) next after the said dwelling-house, buildings, and premises, shall be completely built,

Proprietor to pay builder at one payment.

(*e*) [See *Duckworth* v. *Alison*, 1 Mee. & W. 412.]

(*f*) If the owner of an estate of inheritance contract for erecting buildings on the lands, and die before they are finished, or the money paid, his heir may compel the finishing; and in both cases the executors or administrators of the ancestor must pay the builder out of his personal estate. *Holt* v. *Holt*, 2 Vern. 322; 3 P. Wms. 223; Cas. temp. Talb. 83, n.

Heir may enforce contract for building, &c., against executors.

(*g*) "in manner following; that is to say, the sum of seventy-five pounds per cent. on the amount of the (materials used in the said) buildings and works as they shall proceed, to be ascertained by the surveyor (*or* architect) for the time being, and his certificate under his hand to be conclusive between the said parties. [AND ALSO that the said [*proprietor*], his executors or administrators, will or shall every week during the progress of the said buildings and works, pay and supply the said [*builder*], his executors or administrators, with such sums of money as shall be sufficient for paying and discharging the wages and labour of the workmen and labourers who shall from time to time be employed in or about the said buildings and works; the amount whereof shall be ascertained by the surveyor (*or* architect) for the time being, by a certificate under his hand, and the remainder of the said sum of £——, within," &c. (*as above*).]

Or by instalments.

Proprietor to pay workmen's wages.

done, and finished (*h*). AND IT IS HEREBY DECLARED AND AGREED by and between the said parties hereto, that in case the said [*proprietor*], his executors, administrators, or assigns, should direct any more work to be done (*i*) in or

53. TO BUILD A HOUSE, &c.

Additional work to be paid for.

(*h*) "to the satisfaction of the said [*surveyor or architect*], or such other surveyor as aforesaid, the same to be testified in writing under his hand."

To the satisfaction of surveyor or architect.

(*i*) [A contract for building a house is clearly not a contract relating to land, or for the sale of goods, within the statute of frauds, and unless it is not to be performed within the year, may be made by parol, and if made by writing, may be subsequently varied by parol. *Vide ante*, pp. 284, 408. In *Pinner* v. *Arnold*, 2 Cr. M. & R. 613, the question was, whether an agreement for the purchase of a copper-plate press, to be made and delivered within three months, was within the exemption in the stamp act, 55 Geo. 3, c. 184, as being an agreement for the sale of "goods, wares, or merchandize," and it was held that it was. *Parke*, B., said, "If it had appeared that part of the contract was to fix it to the floor or the walls of the defendant's house, so as to make it a fixture, I should have doubted whether it was a contract for the sale of goods within the meaning of the act, because that would be the same in principle as a contract to erect a pillar. In this case, however, it does not appear to be any part of the contract that it should be so fixed, and its having been put together in the defendant's shop can make no difference in the nature of the contract." See *Cotterell* v. *Apsey*, 6 Taunt. 322: *Heath* v. *Freeland*, 1 Mee. & W. 543.] Where a builder contracts for a particular sum, and additions are made to the original plan, the contract remains binding as far as it can be traced, and the excess only is recoverable on a *quantum meruit*. *Pepper* v. *Burland*, Peake, N. P. C. 103; S. P. *Robson* v. *Godfrey & Thomas*, Holt, N. P. C. 236. 1 Stark. 275. [See *Hoadley* v. *Maclaine*, 4 Moo. & S. 340: *Jackson* v. *Galloway*, 5 Scott, 792. In *Lovelock* v. *King*, 1 M. & Rob. 60, a contract for specific work to be done about a house by a carpenter at a fixed price was varied in the execution in several particulars with the approbation of the employer; among these was the enlargement of a window, which was proved to have caused an additional expense of £5. The defendant had paid £10 beyond the amount agreed upon. The evidence as to the total value of the work was contradictory. Lord *Tenterden*, C. J., in summing up, said: "A person intending to make alterations of this nature generally consults the person whom he intends to employ, and ascertains from him the expense of the undertaking, and it will very frequently depend on this estimate whether he proceeds or not. It is therefore a great hardship upon him if he is to lose the protection of this estimate, unless he fully understands that such consequences will follow, and assents to them. In many cases he will be completely ignorant whether the particular alterations suggested will produce any increase of labour and expenditure, and I do not think that the mere fact of assenting to them ought to deprive him of the

Additional work.

Contracts for sale of goods and for work and labour distinguished.

53. TO BUILD A HOUSE, &c.

about the said dwelling-house, buildings, and works, than is contained in the schedule hereunder written, *Then*, and in

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Additional work.

protection of his contract. Sometimes indeed the nature of the alterations will be such that he cannot fail to be aware that they must increase the expense, and cannot therefore suppose that they are to be done for the contract price. But where the departures from the original scheme are not of that character, I think the jury would do wisely in considering that a party does not abandon the security of his contract by consenting that such alterations shall be made, unless he is also informed at the time of the consent that the effect of the alterations will be to increase the expense of the work. In the present case it is not pretended that any such caution was given, and it does not appear to me that any of the alterations except that of the window, the additional costs of which the money paid is enough to cover, were of such a nature as necessarily to import an increase of expense. The question, however, is entirely for the jury, and it is of great importance, from the frequency of such cases, that they should adopt a correct principle in its decision."]

Express contract excludes any implied promise.

[While an express contract is subsisting, no compensation can be recovered upon a *quantum meruit* for work done which can be referred to it. *Sinclair* v. *Bowes*, 9 B. & Cr. 92. Thus where the plaintiff agreed to remove certain rubbish at a specified sum, under a fraudulent representation by the defendant as to the quantity, it was held that he could not recover for the excess. Upon discovering the fraud, (unless he meant to proceed according to the terms of the contract), he should have repudiated the contract and sought compensation for the past in an action for deceit. *Selway* v. *Fogg*, 5 Mee. & W. 83. See *Read* v. *Hutchinson*, 3 Camp. 351: *Ferguson* v. *Carrington*, 4 Man. & Ry.; 9 B. & Cr. 59: *Rees* v. *Lines*, 8 Car. & P. 126. Therefore in an action for extra work the written contract must be produced. *Jones* v. *Howell*, 4 D. P. C. 176. See *Reid* v. *Batte*, 1 Mood. & M. 413: *Vincent* v. *Cole*, Id. 257; 3 Car. & P. 481: *Fielder* v. *Ray*, 3 Moo. & Pay. 659: *Stephens* v. *Pinney*, 2 J. B. Moore, 349: *Hughes* v. *Budd*, 8 D. P. C. 478: But when there is no agreement for a specific sum, or for completion of the work or non-payment, the value of the work done may be recovered from time to time before the completion of the contract, if the work is of a kind that is usually so paid for. *Roberts* v. *Havelock*, 4 B. & Ad. 404.]

Effect of furnishing better work than that contracted for.

[If a fixed price is agreed upon, and the work furnished is of better quality than that stipulated for, this, if it was done without authority, is still only a performance of the agreement, and the party can neither recover an additional compensation, nor have back his work in order that he may substitute an article of inferior quality, but sufficient to satisfy the contract. *Wilmot* v. *Smith*, 3 Car. & P. 453. On a similar principle depends the rule that if a lessee who is bound to repair or replace fixtures, substitutes better articles than those he has removed, he does so for the benefit of the landlord. Thus where the tenant had covenanted to repair and restore all damage not occasioned by reasonable wear, and he substituted for an old worn-out atmospheric engine another of an improved make and of double the power, and also made

Repairs by tenant.

such case, the said [*proprietor*], his executors or administrators, shall pay or cause to be paid unto the said [*builder*], his executors or administrators, so much money as such extra work, and the materials used therein, shall cost or amount unto, any thing hereinbefore contained to the contrary notwithstanding; [*And* that if it should be thought proper by the said [*proprietor*], his executors, administrators, or assigns, to diminish or omit any part of the work in the said schedule hereunder written, *Then*, and in such case, the said [*builder*], his executors or administrators, shall deduct and allow out of the said sum of £—— so much money as the work so to be diminished or omitted shall amount unto, upon a reasonable valuation, any thing hereinbefore contained to the contrary notwithstanding (*k*).] AND IT IS

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Omitted work to be deducted.

Disputes to be

(*k*) "AND all allowances or deductions for such extra or omitted works respectively shall be ascertained and settled by the said [*surveyor or architect*], or such other surveyor (*or* architect) to be appointed as aforesaid *."

Allowances and deductions to be settled by surveyor or architect.

* [Where the contract provided that the amount to be paid by the

considerable additions to one of the demised buildings; in effect putting that building out of repair, and repairing it with improvements; it was held that the additions could not be distinguished from the repairs, and therefore that the whole belonged to the lessor; although had the lessee merely *added* fixtures for the purposes of his business, he might have removed them. *Sunderland* v. *Newton*, 3 Sim. 450.]

[But of course evidence that the plaintiff has not performed all that he contracted to do, or that he has not done it so well as he was bound to do it, or that he has varied in other respects from the contract, is admissible in reduction of damages, whether a price was fixed by the agreement or not. *Allen* v. *Cameron*, 1 Cr. & Mee. 832: *Chapel* v. *Hickes*, 2 Cr. & Mee. 214: *Thornton* v. *Place*, 1 M. & Rob. 218. See *Street* v. *Blay*, 2 B. & Ad. 456: *Cutler* v. *Close*, 5 Car. & P. 337: *Baillie* v. *Kell*, 6 Scott, 379. If the party who is to do the work deviates from the specification, he must pay the expense of completing the work according to the contract, and cannot recover the value of the work which was not authorised by the contract. *Thornton* v. *Place*, 1 M. & Rob. 218: *Ellis* v. *Hamlen*, 3 Taunt. 52. And if the work is wholly insufficient for the contemplated purpose, the plaintiff cannot recover at all. *Duncan* v. *Blundell*, 3 Stark. 6: *Farnsworth* v. *Garrard*, 1 Camp. 38: *Denew* v. *Daverell*, 3 Camp. 451: *Moneypenny* v. *Hartland*, 1 Car. & P. 352. See *Basten* v. *Butter*, 7 East, 479: *Grounsell* v. *Lamb*, 1 Mee. & W. 352.]

[As to the effect of loss by fire before the completion of the contract, see *Menetone* v. *Athawes*, 3 Burr. 1592: *Gillett* v. *Mawman*, 1 Taunt. 137: *Adlard* v. *Booth*, 7 Car. & P. 108.]

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referred to arbitration.

HEREBY COVENANTED AND AGREED by and between the said parties hereto, that if any dispute or difference should happen or be made between them, or the executors, administrators, or assigns of them, or either of them (*l*), touching or concerning the dwelling-house, buildings, and works, hereby covenanted to be made and done as aforesaid, or touching or concerning any other matter or thing whatsoever, relating to the work hereby contracted to be done, or such additional or extra work as aforesaid, *Then* such dispute or difference shall be left to the determination and award of three indifferent persons, one to be named by the said [*builder*], his executors or administrators, another by the said [*proprietor*], his executors, administrators, or assigns, and the third to be chosen by the said two persons so to be named by each of them the said parties, or his executors, administrators, or assigns, immediately or within ten days after notice of such dispute or difference. AND each of them the said parties, doth hereby, for himself and his heirs, executors, and administrators, covenant and agree with the other of them, his executors and administrators, that they the said parties respectively, and their respective executors and administrators,

Agreement to abide by award.

Disputes with surveyor or architect.

(*l*) "or between either of them, and the said [*surveyor (or architect)*], or such other surveyor (*or* architect) to be appointed as aforesaid,"

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defendant for extra work should be ascertained by his surveyor, and the whole remuneration was to be paid within a certain time after receiving the surveyor's certificate that the contract had been properly performed, it was held that the obtaining the certificate of the surveyor was a condition precedent to the right to sue for the value of the extra work, and that the surveyor's checking the plaintiff's accounts of charges for extra work, and ascertaining the balance, did not supersede the necessity of obtaining his certificate. *Morgan* v. *Birnie*, 3 Moo. & Sc. 76. But when work is to be done to the satisfaction of the contracting party himself, it is enough, if he has had an opportunity of inspecting the work, that the jury is satisfied it was properly done, for the defendant's capriciously and without cause withholding his consent could never have been contemplated by the parties. *Dallman* v. *King*, 5 Scott, 382. When the certificate of a third person is made a condition precedent to payment, his perverse refusal or neglect to grant it, would not of course deprive the party of his right to recover. *Worsley* v. *Wood*, 6 T. R. 710, which was a case of insurance, is distinguishable. As to what amounts to a certificate of approval, see *De Vil* v. *Arnold*, 10 Price, 21.]

will and shall severally stand to, abide, perform, and keep the award and determination of the said *three* persons so to be chosen, or by any two of them, touching the said several matters and things so to be referred to them as aforesaid. So as the same determination be made in writing under the hands and seals of the said arbitrators, or some two of them, within one calendar month next after such reference. AND IT IS FURTHER AGREED by and between the said parties, that the submission hereby made shall, at the option and expense of either of the said parties requiring the same, be made a rule of any of her Majesty's Courts of law at Westminster: AND that the costs and charges attending any such reference or arbitration as aforesaid, shall be in the discretion of the said arbitrators, or any two of them, and shall be paid and satisfied pursuant to their award. IN WITNESS &c.

53. TO BUILD A HOUSE, &c.

Submission to be a rule of Court.

Costs to be awarded.

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54. AGREEMENT *by* COMMISSIONERS *under an* ACT OF PARLIAMENT, *with a Mason and a Carpenter, for* BUILDING *a* BRIDGE.

54. BUILDING A BRIDGE.

ARTICLES OF AGREEMENT made the —— day of ——, in the year of our Lord 18—, BETWEEN [A., B., C., and D.] (*describe the commissioners individually*), being four of the commissioners and trustees nominated and appointed for putting in execution an act made and passed &c., (*set forth the year of the reign and the title of the act*), of the one part; and [*mason*], of &c., mason, and [*carpenter*], of &c., carpenter, of the other part.

Parties.

WHEREAS at a public meeting of the trustees for putting the said act into execution, duly held on the —— day of ——, pursuant to the directions of the act, the said [*commissioners*], by virtue of the powers and authorities in them vested by the said act, determined and resolved, that the intended bridge should be forthwith erected; *And* that they had accepted and agreed to the proposals then and there to them made by the said [*mason*] and [*carpenter*] for building

Recital of meeting of commissioners.

of acceptance of mason's and carpenter's proposals for building bridge.

54. BUILDING A BRIDGE.

the same, according to the plans, elevations, and sections, designed and prepared by [*architect*], of &c., architect, and that day signed by the same trustees, and the said [*mason*] and [*carpenter*], at or for the sum of £——, to be paid as after mentioned; *Subject* nevertheless to such alterations as the said [*commissioners*], or any —— or more of them, should think proper to make or cause to be made in the works of the intended bridge: AND the said [*commissioners*], by virtue of the powers and authorities in them vested by the said act, by these presents *do* appoint [*surveyor*], of &c., architect, to be the surveyor of the works, during their pleasure. NOW THESE PRESENTS WITNESS, that for carrying the said proposals and agreement into execution, the said [*commissioners*] on the one part, and the said [*mason*] and [*carpenter*] on the other part, mutually declare, contract, and agree, as follows: AND FIRST, in consideration of £——, part of the said £——, to the said [*mason*] and [*carpenter*] paid by the said [*commissioners*] at or before the sealing and delivery of these presents, the receipt whereof they the said [*mason*] and [*carpenter*] do and each of them doth hereby admit and acknowledge; *And also*, in consideration of the covenants and agreements hereinafter entered into and contained on the part of the said [*commissioners*], to be by them the said [*commissioners*], their executors and administrators, observed and kept, *They* the said [*mason*] and [*carpenter*], for themselves, jointly and severally (*a*), and

Subject to variations by commissioners.

Appointment of surveyor of works.

Agreement by mason and carpenter, in consideration of ——pounds,

to build a bridge.

Joint and several covenants.

(*a*) Though a covenant be *joint and several*, or several only in the terms of it, yet if the interest and cause of action be *joint*, the action must be brought by all the covenantees. And, on the other hand, if the interest and cause of action be *several*, the action may be brought by one only. *Eccleston* v. *Clipsham*, 1 Saund. 153; 2 Keb. 338. [*Infra*, Vol. 4, p. 236: *Spencer* v. *Durant*, Comb. 115; 1 Shaw, 8: *Slingsby's case*, 5 Rep. 19 a., cit. 1 East, 500: *Johnson* v. *Wilson*, Willes, 248: *Saunders* v. *Johnson*, Skin. 40: *Wilkins* v. *Fry*, 1 Meriv. 262.] So, though a man covenant with two or more *jointly*, yet if the interest and cause of action of the covenantees be *several* and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. *Windham's case*, 5 Co. 8 a: *Wotton* v. *Cooke*, Dyer, 337 b; *Wilkinson* v. *Lloyd*, 2 Mod. 82; *Tippet* v. *Hawkey*, 3 Mod. 263; Bull. Ni. Pri. 157; [and cases cit. *post*, Vol. 4, p. 389].

Covenant to pay annuities construed as a separate covenant.

[By deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the survivor, it was witnessed that C. covenanted with A. and B. and their executors to pay the annuities,

for their respective heirs, executors, and administrators, do and each of them doth covenant, promise, contract, and

54. BUILDING A BRIDGE.

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or either of them, when the grantors should make default in payment. A. died, and it was held, that the interests in the annuities being several, the covenant was also several, and that the annuity granted to A. being in arrear, his executor might maintain an action against C. *Withers* v. *Bircham*, 5 Dowl. & Ry. 106; 3 Barn. & Cr. 254.[J.]]

[[J.] But where in an action of covenant against the executors of A., the plaintiff declared that A. covenanted with him and two other persons, that his executors, &c. should, on a certain event, pay to them an annuity for the use of a third person, and averred that the other two covenantees never executed the deed, it was held, on demurrer, that the declaration was bad, inasmuch as it did not appear that the covenantees, who had not joined in the action, had refused to assent to the deed, and their assent was therefore to be presumed; consequently, upon the general rule that all joint covenantees or obligees must sue, the action was not well brought. *Petre* v. *Bury*, 5 Dowl. & Ry. 152; 3 Barn. & Cr. 353.[J.]] [See *Scott* v. *Godwin*, 1 Bos. & P. 67; *Lane* v. *Drinkwater*, 1 Cr. M. & R. 599.]

Joint and several covenants.

But where two persons covenant *jointly* and *severally* with another, the covenantee may bring an action against one of the covenantors only, though their interest in the subject-matter of the covenant be joint; as where A. lets lands to B. and C., and they covenant jointly and severally with the lessor to pay the rent, or the like, he may bring an action against either of the covenantors; because they are sureties for each other for the due performance of the covenants, and it is as competent for each of them to covenant for the other, as it is for a stranger to covenant for both, which is a usual thing. *Ennys* v. *Donnythorne*, 2 Burr. 1190; *Lilley* v. *Hedges*, 1 Str. 553; 8 Mod. 166, S. C.; 2 Bac. Abr. 68, Gwill. ed. And even if the covenant were joint, and an action brought against *one* of the covenantors, he could only take advantage of it by a plea in abatement. For the distinction which runs through all the cases is between actions brought *by* one of the several covenantees, obligees, or *by* one of several with whom any contract, whether in writing or parol, is made, and actions brought *against* one of several joint covenantors, obligors, or contractors. In the former case the action must be brought by all the parties. For where there are several covenantees or obligees, and one of them only brings an action, without averring in the declaration that the others are dead, the defendant may either take advantage of it at the trial as a variance upon the plea of *non est factum*, or pray oyer of the deed, and demur generally. So where an action is brought by one of several with whom any contract has been made, the defendant may take advantage of it upon evidence at the trial, upon the plea of *non assumpsit;* or if it appears upon the face of the declaration, that the contract was made with others as well as the plaintiff, it will be error. *Slingsby's case*, 5 Co. 18 b: *Eccleston* v. *Clipsham*, 1 Saund. 153: *Leglise* v. *Champante*, 2 Str. 820: *Vernon* v. *Jefferys*, 2 Str. 1146: *Cabell* v. *Vaughan*, 1 Saund. 291 b; 1 Vent. 34, S. C.: *Saunders* v. *Johnson*, Skin. 401: Com. Dig. *Pleader*, (2 V. 2);

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agree with and to the said [*commissioners*], their executors and administrators, that they the said [*mason*] and [*carpenter*], their executors or administrators, will at their own costs and charges, forthwith begin, and in an expeditious and workmanlike manner, build, erect, and finish the said intended bridge agreeably to the said plan and sections: AND ALSO find, furnish, and provide all the materials incident or necessary to building the same; *All* such materials to be the best of their several kinds, and of the respective dimensions, nature, and qualities hereinafter expressed; *And* to be approved by the surveyor of the works for the time being; (*Except* only such work and materials as are hereinafter agreed by the said commissioners to be provided, supplied, and executed at their own proper expense). AND THE SAID [*mason*] and [*carpenter*] for themselves, jointly and severally, and for their respective heirs, executors, and administrators, do, and each of them doth, more particularly covenant, promise, contract and agree with the said [*commissioners*], their executors and administrators, in manner following; that is to say, THAT they the said [*mason*] and [*carpenter*], their

Provide materials of the best qualities.

To be approved by the surveyor.

To make a bat-

Bull. Nisi Prius, 158; *Osborn* v. *Crosborn*, Sid. 238: *Holdwich* v. *Chafe*, All. 41: in which last case a distinction seems to be made between the plea of *non est factum*, and praying oyer and demurring: but this distinction does not seem to be warranted by any of the modern cases. But where an action is *brought* against one of several joint covenantors or obligors, the defendant can only take advantage of it by a plea in abatement. And though it should appear upon the record that there are others who ought to be joined as defendants, yet that will not be error. *Whelpdale's case*, 5 Co. 119: *Gilbert* v. *Bath*, 1 Str. 503. So in contracts. *Rice* v. *Shute*, 5 Burr. 2611: *Abbott* v. *Smith*, 2 Black. Rep. 947: Wms. n., 1 Saund. 153, *post*, title BOND.

[J. In the case of *Merceron* v. *Dowson*, 8 Dowl. & Ry. 264, 5 B. & Cr. 479, where an action of covenant was brought against the assignee of a lease, and the defendant pleaded in bar, that, for one period he was possessed of one-sixth only, as tenant in common with certain other persons; and for another period, of one-third only, as tenant in common with others; and that no greater interest came to him by assignment: it was held, that this plea was bad in substance, as the defence was no bar to the whole action; for the defendant was liable to part, and should have pointed out the other persons liable, and then the plaintiff might have been compelled to include them in his declaration: and the plea was bad in form also, as it merely confessed that the defendant *had possession* of part of the premises, and not that he was *assignee*. *Merceron* v. *Dowson*, 5 Barn. & Cre. 479; 8 Dowl. & Ryl 264. J.] See further, title BOND.

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executors and administrators, will and shall, in order to lay the bottoms or foundations of the piers and two abutments of the said intended bridge, cause a batter d'eaux to be formed ashore, the sides whereof are to be of a sufficient strength and thickness, so as with proper shorings across the inside thereof to resist the pressure of the water; and which sides are to be so joined, constructed, and caulked, as to be water-tight; the size and shape thereof to correspond with the figure of the lower part of the piers, and to be high enough to exclude high water when placed in the deepest situation: AND will and shall cause the batter d'eaux to be carried to the intended situation of the pier to be first built, and there sunk and loaded with the materials for building the same: AND after the sides of the said batter d'eaux are properly placed for the exact situation of the said first pier, a row of dovetailed pier piles shall be driven into the bottom of the river, to such depth as the surveyor for the time being of the said works shall direct; the points thereof, when so driven in, to be at least four feet deeper than the foundation of such pier; and the head of such piles to be one foot at least above low-water mark; and the joints of the said piling to be so executed as to be water-tight; the said row of dovetailed piling to be all round the inside of the sides of the batter d'eaux; and where the outside of the piling joins the inside of the batter d'eaux, the said space to be strongly secured by bolting the said sides and piling together, and by caulking the same, so as to be water-tight; THE water, sand, and mud, contained in the batter d'eaux, to be removed and thrown out, and the said space to be kept entirely free and clear therefrom, until the mason-work of the said pier is carried up to low-water mark: AND the said excavation of the sand and mud, and the throwing and keeping out the water, shall be continued to such depth as that the first course of mason-work of the same pier may be at the depth hereinafter mentioned: AND ALSO will and shall cause the foundation for the said pier to be exactly levelled; and the heads of the said piling cut off level with the same; and will and shall cause a sufficient quantity of fir scantlings to be laid across the said foundation, so as to lie close one to another, and cover the whole space thereof; and will and shall also lay another row of scantlings across the first row, and from end to end of the said pier, so as to cover the said space in the same manner between the dovetailed piling

ter d'eaux on shore.

And carry same to situation of first pier.

And erect dovetailed pier piles in a certain manner.

Water, sand, and mud, to be removed from batter d'eaux.

Foundation of pier to be levelled.

Piling to be levelled.

Fir scantling to be laid across foundation, &c.

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Dimensions of scantlings.

When stone-work of first pier finished, to remove batter d'eaux to situation of another pier.

Foundation to be carefully laid.

When piers are finished, to cut off dovetailed piling.

Fir scantlings to be sunk a certain depth.

Piles to be of such length and dimensions, and driven as surveyor shall direct, with a hammer of a certain weight.

Piles to have iron shoe.

To provide guard-piles, and drive them as surveyor shall direct.

To provide

THE said scantlings of fir not to be less than five inches thick, ten feet long, and of sound timber, without the least sap or worm in the same: AND ALSO will and shall cause the sides of the said batter d'caux to be unfixed and detached from the heads of the dovetailed piling, after the stone-work of the said pier is carried up to low-water mark, and will and shall cause the said sides to be weighed up and carried from and over the said pier, to the situation of another pier: AND will and shall cause each thing herein above mentioned for laying the foundation of the said first pier to be carefully and punctually observed and executed in and for the making a foundation for and to each and all of the several other piers, and the abutments of the said intended bridge: AND after the said piers are all finished, will and shall cut off the dovetail piling at least three feet below low-water mark: AND will and shall cause the said scantlings of fir in two rows, or the frame for the half pier or abutment on the side of the river, and for each of the two piers next to that side to be so far sunk into the bed of the river, as that the first course of stone-work set thereon shall be entirely below the surface of the clay; and the said frames for each of the other two piers, and the half pier or abutment on the —— side of the river, to be so far sunk as that the first course of stone-work set thereon shall stand on a level with the surface of the clay: AND that the piles which shall be driven into the bed of the river, and otherwise used for securing the frames of the piers and abutments of the said intended bridge, shall be of such length and dimensions, and be driven to such depths as the surveyor for the time being of the said works shall direct, with or by a hammer, the weight of which, without the follower, shall be at least eleven hundred weight: and its fall from the top of the sliders to the bottom twenty feet at the least: AND that each of the said piles shall have an iron shoe, of the weight of eight pounds at the least, fixed to one end thereof, in a workmanlike manner, and of such form as shall be best fitted for piercing the bed of the said river: AND also will and shall find and provide so many guard-piles, to measure one foot square, and of such lengths as the surveyor of the said works for the time being shall direct; and will and shall cause them, and each and every of them, to be driven into the bed of the said river, to such depths and in such situations, as the surveyor of the said works for the time being shall direct: AND will and shall

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find such and so many floating booms, to measure one foot square, and of such lengths as the surveyor of the said works for the time being shall direct; and will and shall fix each end thereof to some of the said guard-piles, in such manner as to rise and fall with the tides, and to be of sufficient strength to keep off all barges, boats, and ice, from breaking through the same, and damaging any of the works of the said intended bridge: ALL such guard-piles, and floating booms, to be by the said [*mason*] and [*carpenter*], their executors or administrators, made, found, and provided, at the costs, charges, and expenses of them, some or one of them: and also brought to the place or situation where the same shall be made use of for the purposes above mentioned, at the expense of them, some or one of them; *But* to be there driven and fixed respectively, and afterwards from time to time removed, conveyed, driven, and fixed, at the expense of the said [*commissioners*]; AND after having served all the purposes to which the same shall by the surveyor for the time being of the said works be directed to be applied, the said guard-piles and floating booms shall be the property of the said [*mason*] and [*carpenter*], their executors and administrators. PROVIDED NEVERTHELESS, *and it is declared and agreed* between the parties, that if the surveyor of the works for the time being should, when and so soon as the foundations of the piers are excavated, from the quality of the clay or the nature of the foundation, judge it necessary or think it prudent, for the sake of better securing and making good the said foundations, to drive piles into the bed of the river, in the intended situation of all or any of the piers, *Then*, and in such case, the said [*mason*] and [*carpenter*], their executors and administrators, will and shall cause such and so many piles to be there driven, to such depths as the surveyor for the time being of the said works shall direct; such piles to be found, provided, and delivered for that purpose, by and at the expense of the said [*commissioners*]: AND will and shall cause each of the said piles which shall be so driven, to be cut or sawed off as near to the surface of the ground in the foundations as the said surveyor shall direct, and in such manner as to be exactly on a level one with another; THE said [*commissioners*] making the said [*mason*] and [*carpenter*], their executors and administrators, a reasonable satisfaction or recompense for driving and sawing the same; such satisfaction or recompense to be ascertained by the surveyor of the said

floating booms, as surveyor shall direct,

to rise and fall with tides.

Guard-piles and floating booms to be provided by mason and carpenter;

but to be driven and fixed at the expense of commissioners.

And to belong to mason and carpenter.

If surveyor should judge additional piles necessary, after foundations excavated;

contractors to drive same,

but the piles to be provided by commissioners.

To cut off additional piles.

Commissioners to make recompense for driving and sawing additional piles, to be ascertained by surveyor.

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works for the time being. AND THE SAID [*mason*] and [*carpenter*], for themselves jointly and severally, and for their several and respective heirs, executors, and administrators, do, and each of them doth, further covenant, promise, contract and agree with and to the said [*commissioners*] in manner following; that is to say, THAT all and every part of the said four piers, and each and every of them, and of the two half piers and abutments of the said intended bridge (*except* such parts thereof as the surveyor for the time being shall be of opinion may be filled up with rubble work, without in anywise diminishing or taking from the necessary and required strength of such a work), shall be of the best stone that can possibly be got in any of the quarries wrought in the parish of ——: AND such stones as shall be made use of in the said piers and abutments, and also in each of the arches of the said intended bridge, shall be of such dimensions, or of such weights, as the surveyor of the said works for the time being may deem necessary, or shall think fit to direct; AND that the first course of stone in each of the said piers shall entirely fill up the space contained within the heads of the dovetail piling: AND (unless the surveyor of the said works for the time being shall direct stone of smaller dimensions to be made use of) that no stone in the piers, from the foundation to the high-water surface, shall be less than fourteen inches thick: AND the stone blockwork, and stretchers, shall break joint on the face of the work one foot at least; and the heading courses shall break joint inwards towards the middle of the work, one foot at least; and the heading courses also shall break joint at least one foot on the face of the work: AND that all the vertical joints in all the leading courses shall be square, one foot at the least inwards towards the middle of the work, from the outward faces of such courses: AND the vertical joints of the stretchers shall be square, at least one foot from the face inwards towards the middle of the work: AND the horizontal joints shall be good the whole breadth of the stone: AND that the ashler stones shall break joint at least one foot, where it can be done: AND that no beds of the ashlers shall be less than nine inches broad: THE headings, or bond stones, shall not be less than two feet four inches long; and the inner end shall be larger than the outside head or face; and that there shall be one such bond stone in every ten feet length in every course; and no two bond stones shall be

Further agreement by contractors.

Piers to be of best stone.

Stone to be of such dimensions as surveyor shall direct.

First course.

No stone to high-water surface to be less than fourteen inches thick.

Stone, &c. to break joint.

Vertical joints to be square.

Horizontal joints.

Ashler stones.

Beds of ashlers.

Bond stones.

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within four feet of each other: AND ALSO, that all the beds of the stones, from the foundations to the surface of the low water, shall be good scalped work: AND that all the beds and joints of the stones from the surface of low water upwards shall be good hewn work; and from the foundations to high-water surface, shall be laid in good Dutch terrass, five inches at least from the face, as is usual in such work. AND that all the piers, the two half piers and abutments, shall be of hewn work from high-water surface to the top the parapet: AND that all the spandrels shall be scalped work; and that all the stones in that course, or bed, or layer of stone block, in every pier, and in each half pier and abutment, that shall be immediately below or at the surface of low water, shall be cramped and fastened together with dovetail oak cramps, each of which cramps shall not be less than one foot six inches long, ten inches broad at the ends, six inches broad in the middle, and three inches thick, or of such other sizes and dimensions as the surveyor of the said works for the time being shall direct; and that particular thick, broad, and long stones shall be made use of in the course to be so cramped and fastened together: AND that each block stone to be made use of in the said piers shall measure three inches both in length and breadth more than in height or thickness: AND that all and every part of the said five arches of the said intended bridge shall be done, executed, and performed, in a good, substantial, and workmanlike manner, with the best block stone that can possibly be procured or gotten in any of the above-mentioned quarries; and to be of such sizes and dimensions as the surveyor of the said works for the time being shall direct, or so near to such dimensions as such stones can be got: AND that each single stone to be made use of in the said arches shall measure three inches at least, both in breadth and length, more than in height or thickness; AND that no vertical joint in any of the said five arches, nor in any other part of the said intended bridge, shall be within one foot of the course immediately below it: AND that all the outward ends of all the arch-stones shall be formed and rusticated according to the shape and sizes determined by the said plan, elevations, and sections: AND that the parapet or battlement of the said intended bridge shall be of hewn stone, and correspond in form with the drawing shewn in the said plan; that is to say, that the several spaces be-

Beds and joints of stones.

Piers.

Spandrels.

Stones under low-water mark to be cramped.

Dimensions of cramps.

Long and broad stones to be used under water.

Dimensions of pier stones.

Arches to be executed in workmanlike manner.

With best block stone from certain quarries, of such dimensions as surveyor shall direct.

Dimensions of stones in arches.

Vertical joints.

Outward ends of arch stones.

Parapet.

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tween the several recesses made upon the several piers of the said intended bridge, shall be divided into a convenient number of equal spaces, and that stones of about twelve by eighteen inches square, and three feet long, shall be placed and well fastened with their ends upon the façade or facia: each of which stones shall have a groove or recess cut in the two opposite edges thereof, six inches wide and about two inches deep, to receive the edges of broad long stones six inches thick and about three feet broad or high; and which are to stand upon their edges on the said facia, between the said first-mentioned stones, so as to form a pannel between the said three-feet high stones and the facia, and the coping of the parapet or battlement of the said intended bridge; and so as that no joint may be seen directly on the face of the parapet: AND ALSO that there shall be sufficient iron cramps across every joint at the top of the coping of the parapet, and that each corking of the said cramps shall be upset, and two inches long from the outside of the cramp; and that each cramp shall be one square inch at least, and a foot long between the corkings and sunk well in the said coping, as the surveyor of the said works for the time being shall direct; and shall be inlaid and run flush with lead: AND that proper hard stones (where there is no footpath) shall be placed on end against the parapet, to keep carriages from striking against it: AND ALSO that all the spaces in the haunches, or behind the spandrel walls of the arches; all the 'butments of the bridge and cross walls, as described and expressed in the said plans or drawings, shall be executed in a good, substantial, and workmanlike manner in rubble work, to consist of the largest flat-bedded stones carefully packed with smaller ones and mortar; the large stones to be laid so as to break bond, in a workmanlike manner: AND such rubble-work shall be executed at the same time and incorporated with the other work, and with stones to be got in —— quarry, if the surveyor of the said works for the time being should approve of the same: AND ALSO that a foot passage on the side of the carriage road shall be made and executed in a good, substantial, and workmanlike manner, with the best and hardest flags that can be got in any of the said quarries, in the said parish of ——; such flags to be a foot and a half in length, a foot in breadth, and at least six inches in thickness: AND ALSO, that proper places shall be cut in the outward edges of the

Iron cramps to parapet.

Dimensions of cramps.

Stones to be placed for keeping off carriages.

'Butments, &c. to be executed in workmanlike manner.

Rubble work.

Foot passage to be made in workmanlike manner.

Excavations to be made for

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said footways for the reception of large stones, at such convenient distances as the surveyor of the said works for the time being shall judge necessary, for the sake of preventing the said footway receiving damage from carriages: AND the whole of the said footway shall be laid and performed upon the rubble-work; and shall, in every part thereof, be four feet broad, and raised six inches above the surface of the carriage road: AND ALSO will and shall make such channels or conduits for carrying off the water from the said intended bridge, in such manner as the surveyor of the said works for the time being shall direct: AND ALSO, that all such parts of the works of the said intended bridge as are not hereinbefore contracted for and agreed to be erected and built in any particular manner hereinbefore specified and described, shall be constructed with such materials, and executed and performed in such manner, as the surveyor of the said works for the time being shall direct: AND that all and every part of the works of the said intended bridge shall be performed and executed in a strong, well-beaten, and incorporated mortar, composed of a strong quick stone-lime, and a sufficient quantity of clear river-sand, with a sufficient quantity of the best Dutch terrass, in such parts of the said works as the surveyor thereof for the time being shall direct; and before such mortar is made use of, the same shall be approved by such surveyor. PROVIDED ALWAYS, *and it is agreed and declared* between all the said parties, that if the said [*commissioners*], or any —— or more of them, should at any time or times hereafter think proper to direct any alterations to be made in the form or quantities of the works hereinbefore agreed to be performed, before the same shall be performed, *Then*, and so often, and in every such case, they the said [*mason*] and [*carpenter*], their executors and administrators, shall pursue such directions as they shall in that behalf receive from the same [*commissioners*], or any —— or more of them; and execute and perform the same in a strong, proper, and workmanlike manner: AND that it shall be referred to the surveyor for the time being of the said works to consider, and by some writing under his hand to determine, how far such alterations on the whole will be a saving or additional expense to the said [*mason*] and [*carpenter*], their executors and administrators: *And* if the same should appear to be a saving, the sum saved shall be abated out of the last payment of the said £——:

stones to keep off carriages.

Footway to be laid on rubble-work,

and be four feet broad, &c.

To make channels to carry off water.

Works not specified to be done as surveyor shall direct.

Strong well-beaten mortar to be used.

Trustees may make alteration in works, and in such case

surveyor to settle difference in expense.

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But if such alterations on the whole should appear to be attended with an additional expense, the same shall be satisfied and made good to the said [*mason*] and [*carpenter*], their executors and administrators, by the said [*commissioners*], over and above the said —— hundred pounds, within three months next after finishing and completing the said bridge: AND THE SAID [*mason*] and [*carpenter*], jointly and severally, and for their several and respective heirs, executors, and administrators, do, and each of them doth, further covenant, promise, contract, and agree with the said [*commissioners*], their executors and administrators, that if any of the materials before agreed to be provided, made use of, or employed by them, in or about the works of the said intended bridge, should be found defective by the surveyor of the said works for the time being, *Then* and in such case, all such defective materials shall be forthwith removed at the expense of the said [*mason*] and [*carpenter*], their executors and administrators, and others in all respects fit, proper, and sufficient, and to the satisfaction of the same surveyor, shall be immediately provided and made use of, in the place and stead of such as shall be deemed defective: AND that if any part of the said works should be found defective by the surveyor of the same for the time being, in point of workmanship, (as by a bad disposition of the materials, or otherwise), *Then*, and in every such case, such defective work shall be forthwith pulled down and removed, at the expense of the said [*mason*] and [*carpenter*], their executors and administrators, and immediately rebuilt in a complete workmanlike manner, to the satisfaction of the same surveyor: AND FURTHER, that they the said [*mason*] and [*carpenter*], their executors and administrators, will and shall find and provide, at their own expense, all and all manner of centres, scaffolding, machinery, instruments, tools, tackle, cables, ropes, boats, barges, lighters, carriages, cranes, and all other materials whatsoever, for executing and performing all the work whatsoever necessary for the beginning, carrying on, constructing, completing, and finishing of the said intended bridge (*Except* as before excepted): AND ALSO will and shall do, execute, and perform, all and all manner of labour and workmanship that shall be necessary or proper for the moving, removing, doing, executing, performing, and completing the several and respective parts of the said intended bridge; and bear, pay, and defray, all the necessary and incidental

Covenant by contractors, that if surveyor should think any materials not proper, they would remove them, and provide such as are proper at their own expense.

If any part of works be found defective, such part to be pulled down and rebuilt at expense of contractors.

Contractors to provide machinery, tools, &c. for building bridge.

Contractors to execute every kind of labour.

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charges and expenses whatsoever which shall attend the same: it being the intent and meaning of this agreement, and the parties hereto, that the said [*commissioners*] are not to be at any further or other expense in and about the beginning, building, completing, and finishing the said intended bridge, than what is hereinbefore and hereinafter expressly covenanted, contracted, and agreed to be by them paid, done, and performed: AND MOREOVER, that they the said [*mason*] and [*carpenter*] will and shall during the whole time of building the said intended bridge, give due personal attendance upon the execution of all the works aforesaid; and take effectual care that the same be carried on, executed, and performed, with such expedition and despatch, that the said intended bridge be made passable for foot passengers on or before —— next; and for horses, carts, and carriages, on or before —— next; and in every respect completed and finished on or before ——: (*a*) AND that if it should happen that the said intended bridge should not be passable, completed, and finished as aforesaid, within the times aforesaid, through or by reason or means of any neglect or default of them the said [*mason*] and [*carpenter*], or either of them, or the executors or administrators of them, or either of them, or of their or any of their workmen or servants, in the performance of any of the works so contracted to be done, executed, and performed, *Then* that they the said [*mason*] and [*carpenter*], their executors, and administrators, will and shall forfeit and pay unto the said [*commissioners*], their executors and administrators, the sum of fifty pounds of lawful British money, by the month, for each and every calendar month which shall be taken up in finishing or completing the said intended bridge, after the said —— day of ——; such forfeitures to be retained and deducted out of so much of the said sum of £——, as for the time being shall remain unpaid: (*b*) AND THE SAID [*commis-*

Commissioners to be at no other expense than what they covenant to bear.

Contractors to give personal attendance, and finish bridge, if possible, before a certain day; and if not finished by that time, owing to their neglect, to incur a penalty.

Covenant by

(*a*) [If either party is prevented from performing his part of the contract within the stipulated time, by the acts or defaults of the other party, the stipulation is dispensed with altogether, and he will not, in the absence of evidence of a new contract to that effect, be held bound to complete within the time mentioned, allowing for the time lost by the other party's default. *Holme* v. *Guppy*, 3 Mee. & W. 387.]

Effect of default in discharging the other party.

(*b*) [In an action brought for extra work under an agreement containing a covenant of this nature, the defendant having already paid the

Penalty set off against extra work.

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commissioners to pay remainder of sum for which bridge is to be built, by instalments at different stages of the work.

sioners], in consideration of the premises, do, and each and every of them doth, for themselves jointly and severally, and for their several and respective heirs, executors, and administrators, covenant, promise, contract, and agree, with the said [*mason*] and [*carpenter*], their executors and administrators, that they the said [*mason*] and *carpenter*], their executors or administrators, duly executing and performing all and every the articles, clauses, covenants, agreements, matters, and things, on their several and respective parts to be observed, done, and performed, according to the true intent and meaning of these presents, and of the parties hereto, *They* the said [*commissioners*], their heirs, executors, or administrators, will and shall pay, or secure to be paid, to the said [*mason*] and [*carpenter*], their executors or administrators, the sum of £——, residue of the said sum of £—— in full, for the building and completing of the said intended bridge, in manner following; that is to say, the sum of £—— when the frame for the foundation of each of the piers shall be laid, and also the abutments; the sum of £—— when each of the piers and abutments shall be [*of a certain height*]; the sum of £—— when each arch shall be closed; the sum of £—— when the spandrels and piers shall be carried to their full height, and ready for the facia or seat of the parapet; and the residue of the said sum of £—— within three months after the said bridge shall be finished. AND THE SAID [*commissioners*] do, and each and every of them doth, for themselves jointly and severally, and for their several and respective heirs, executors, and administrators, covenant, promise, and agree with and to the said [*mason*] and [*carpenter*], their executors and administrators, that they the said [*commissioners*], their heirs, executors, or administrators, will and shall make satisfaction to the owners or occupiers of lands on either side of the said river, which may be injured by carrying on the said intended works; AND ALSO will and shall indemnify, save harmless, and keep indemnified the said [*mason*] and [*carpenter*], their executors and administrators, of, from, and against the same; and

Commissioners to make satisfaction to the proprietors of lands on each side of river, to which any damage may be done by carrying on works, and to indemnify contractors therefrom.

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whole of the contract price, it was held that the defendant might set off penalties incurred by the plaintiff on account of delay, as he had a double remedy, either to deduct them from the contract price, which he was not bound to do, or to recover them as payments due, which he might therefore set off. *Duckworth* v. *Allison*, 1 Mee. & W. 412.]

54. BUILDING A BRIDGE.

all actions, suits, claims, and demands, costs, charges, damages, and expenses whatsoever, which shall or may be borne or paid by the said [*mason*] and [*carpenter*], their executors or administrators, by reason or on account thereof; PROVIDED ALWAYS, *and it is hereby further agreed* between the said parties, that if any damage by floods, or other inevitable accident, should happen to the said works, which the said [*mason*] and [*carpenter*], their executors or administrators, shall not have it in their power to prevent, the same shall be made good and repaired by the said [*mason*] and [*carpenter*], their executors and administrators, at the expense of the said [*commissioners*]; *But* if such damage should happen, owing to, or in consequence of, the neglect or default of the said [*mason*] and [*carpenter*] (*a*), or either of them, their or his executors or administrators, the same shall be immediately remedied, and made good at their own expense. (*Add arbitration clause, ut ante*, 647). AND, LASTLY, for the performance of all the covenants and undertakings herein contained on the parts of the said [*mason*] and [*carpenter*], their executors and administrators, they the said [*mason*] and [*carpenter*] jointly and severally bind themselves, their heirs, executors, and administrators, to the said [*commissioners*],their executors and administrators, in the sum or penalty of £——, with interest: AND for the performance of all the covenants and agreements herein contained on the parts of the said [*commissioners*], their executors and administrators, they the said [*commissioners*] jointly and severally bind themselves, their heirs, executors, and administrators, to the said [*mason*] and [*carpenter*], their executors and administrators, in the sum or penalty of (*b*) £——, with interest. IN WITNESS &c.

If damage happen to works by floods, &c. which contractors could not prevent, commissioners to repair same.

Arbitration clause.

Nomine pœnæ on part of contractors.

Nomine pœnæ on part of commissioners.

(*a*) [A workman or builder, &c., employed for him is bound to provide against extraordinary floods, &c., if they are foreseen in time. *Leck* v. *Maestaer*, 1 Camp. 138.]

(*b*) *Vide ante*, p. 436, (*h*).

55. BUILDING A SHIP.

55. AGREEMENT *for* BUILDING *or* COMPLETING *a* SHIP.

Parties.

ARTICLES OF AGREEMENT made the —— day of ——, in the year 18—; BETWEEN [*builder*], of &c., shipbuilder, of the one part; and [*merchant*], of the same place, merchant, of the other part.

Recital of contract.

WHEREAS (*a*), it hath been agreed by and between the parties hereto, that the said [*builder*] shall at his present place of building, on or before the —— day of —— next, in a workmanlike manner, build for the said [*merchant*] the hull of a ship or vessel of the dimensions hereinafter mentioned, for the price or sum of £——, and such further and other sum and sums of money, to be ascertained and paid at such times and in such manner as hereinafter is mentioned and specified. IN CONSIDERATION of which agreement, and of the sum of £——, part of the said sum of £——, by the said [*merchant*] to the said [*builder*] in hand paid at or before the execution of these presents, the receipt whereof is hereby acknowledged, *he* the said [*builder*] doth covenant and agree with the said [*merchant*], his executors, administrators, and assigns, to build and construct for him the said [*merchant*], his executors, administrators, or as-

Agreement to build ship. Part of the money paid.

FINISHING.

(*a*) If it be a contract for finishing a ship already upon the stocks, say,

"WHEREAS there is now upon the stocks in the yard of the said [*builder*], at &c., the hull of a ship of the following dimensions; that is to say, (*state the dimensions as in the next page*): AND WHEREAS the hull of the said ship is already (*state the degree of forwardness*): AND WHEREAS the said [*merchant*] hath contracted and agreed with the said [*builder*], for the purchase of the hull of the said ship as she now stands, for the sum of £——; and hath also contracted and agreed with the said [*builder*] for completing the hull of the said ship, in manner and upon the terms hereinafter mentioned."

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Dimensions of ship, and descriptions of materials to be used.

signs, the hull of a ship or vessel of the following description or dimensions; that is to say, the keel of the said hull to be in length within the posts eighty feet; the rake afore to be ten feet, the rake abaft to be suitable; the harpins to lie at fourteen feet forwards, and fifteen feet aft; the hull at the dead flat to be in breadth twenty-eight feet; the berth thereof to be nineteen feet from the top of the ceiling to the top of the covering board; the square of the floor to be fifteen inches on the keel, and eleven inches at the sirmark; the timbers to be eight inches square at the binds, and four inches at the top timber heads; the transom to be eighteen feet long; the post four feet broad; the plank from the keel to the binds to be three inches thick, *Except* five strokes on each side, *viz.* three on the bilge and two under the binds, which are to be four inch plank; the hull to have three binds, each ten inches deep and seven inches thick; one stroke immediately above the binds to be four inch plank, all the rest to the channel bind three inch plank, and above the channel bind to be two inch and a half plank; to have twelve hold beams, thirteen inches square, with eight hooks forward, all whole transoms aft, and one hook to be ceiled with three inch plank from the keel to the underside of the hold beams, *Except* three strokes on the bilge on each side four inch plank; all the ceiling, from the hold beams to the upper deck beams, to be two inch and a half plank, *Except* one long plank under the main deck beam, which is to be four inches thick; to be ceiled fore and aft with two inch and a half plank, and above the binds forward with two inch plank; to have one four inch plank to be bolted to the fore beam, and transom knees to be bolted through the side into the beams; the main deck to be laid with Norway deals three inches thick, two abaft the main mast, and from thence to be two inch and a half plank; to have a sufficient number of main deck beams; to have two feet ten inches waste, and two drifts fore and aft two feet deep; the quarter deck and forecastle deck to be laid with Norway deals two inches thick; the floors to be sixteen feet long, with fourteen inches rise; the binds to have two feet and a half hang; the covering boards in the midships to be two inch and a half plank; to have windlass, capstan, catheaps, rudder, and tiller, all of sound good oak, of a size and construction fit for such a vessel; to have fourteen gunports; all the timbers and planks to be made use of in building the hull of

55. BUILDING A SHIP.

the said vessel, (*Except* the planks with which the decks are laid, and which are to be of Norway deal as aforesaid), are to be of oak of English growth, well seasoned and dried, and in every respect fit for the purposes to which the same shall be applied: the trennels to be bought at London, and be of the best sort; the hatches to be made and constructed in the best and most approved manner; the hull and deck of the said vessel to be well caulked with well-teazed oakum, and fitted up and finished in a substantial and workmanlike manner, with all things necessary and usually made and provided by shipbuilders for ships of such burthen and construction as the said intended vessel shall be; and the said ship or vessel shall, on or before the said —— day of ——, be launched, and brought and moored in safety in the harbour of ——. AND THE SAID [*merchant*], in consideration of the said ship being so built and launched as aforesaid, doth covenant and agree with the said [*builder*], his executors, administrators, and assigns, *That* he the said [*merchant*], his heirs, executors, or administrators, will or shall pay (*b*), or cause to be paid unto the said [*builder*], his executors, administrators, or assigns, the further sum of £——, other part of the said sum of £——, upon laying the harpins of the said vessel; £—— more, other part of the said sum of £——, upon laying the deck; and £——, the residue of the said sum of £——, upon launching and mooring the said vessel in safety in —— harbour: AND ALSO such other sum and sums of money as [*referees*], of &c., shall, within ten days from the time of mooring the said vessel in safety in —— harbour as aforesaid, in that behalf think reasonable: *Or* in case either of them should die or refuse to undertake such determination, Then such sum and sums of money as two indifferent persons, the one to be nominated by the said [*builder*], his executors or administrators, and the other by the said [*merchant*], his executors or administrators, shall, within fifteen days from the time aforesaid, in that behalf resolve and determine upon, in order to complete the price of the said hull: *And* in default of any such determination within the respective times hereinbefore for that purpose limited, then the said [*merchant*], his heirs, executors, or administra-

To be launched in a certain time.

Covenant to pay remainder of price of ship at certain stages of the work.

Covenant to pay such further sum as referees shall determine.

Umpire.

(*b*) It might be prudent, in some instances, for the person for whom the ship is built to give a bond for payment of the money.

55. BUILDING A SHIP.

tors, shall pay to the said [*builder*], his executors, administrators, or assigns, such sum or sums of money, for the purpose last mentioned, as shall be resolved upon and determined by such one indifferent person as the two referees, who shall undertake the determination of the said matter, shall for that purpose nominate and appoint umpire in the premises, who shall determine the same within ten days after he shall be appointed umpire: AND that the determination to be made as aforesaid shall be conclusive on the said parties hereto, their respective executors and administrators: AND that the sum and sums of money so to be ascertained and determined, shall, within ten days after such determination, be paid by the said [*merchant*], his heirs, executors, or administrators, to the said [*builder*], his executors, administrators, or assigns: AND *it is further agreed* between the said parties hereto, that all differences arising between them, touching the said hull, shall in like manner be referred and determined, and that every such determination shall be final and binding. AND THE SAID [*merchant*], agrees to provide for the carpenters employed in the building of the said hull, during such time as they shall be so employed, such allowances of bread, cheese, and ale, as are usual in such cases; AND *it is also agreed* between the said parties hereto, and particularly the said [*builder*] doth agree, that the same hull, from time to time during the building thereof, and until the same shall be so moored in safety as aforesaid, and assigned to the said [*merchant*], his executors or administrators, shall stand charged with and be a security to him and them for the said sum of £—— already paid, and for such further and other sum and sums of money as shall be paid to the said [*builder*], his executors, administrators, or assigns, in pursuance of this agreement; *And* that the said [*merchant*] may at any time take possession of and sell the same, (but not so as to interfere with the completion of this contract, unless the said [*builder*] shall have committed some breach thereof); *To the intent* that the said hull shall not be or become liable or subject to the debts, contracts, or engagements, or otherwise affected by any act of the said [*builder*], his executors or administrators, to the prejudice of the said [*merchant*], his executors, or administrators: AND that the said [*builder*] his executors or administrators, will or shall, after the said hull shall be so moored in safety in the harbour of —— as

Determination to be final.

Money to be paid in ten days after determination.

Differences to be referred to arbitration.

Merchant to provide carpenters with bread, cheese, and ale.

Ship, whilst building, to stand charged with monies advanced.

Builder, after ship is launched, to assign her to purchaser.

55. BUILDING A SHIP.

aforesaid, by some proper deed or instrument in writing, assign the same, free from all incumbrances, to the said [*merchant*], his executors or administrators, at his and their request, costs, and charges. IN WITNESS &c.

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56. TO PAY FOR GOODS TO BE SUPPLIED TO ANOTHER.

[J. 56. AGREEMENT *to pay for* GOODS *to be* FURNISHED *to a* THIRD PERSON. (*A short Form* (*a*)).

Parties.

AGREED this —— day of —— BETWEEN [A. B.], of &c., of the one part; and [C. D.], of &c., Manchester Warehousemen, of the other part, as follows:—

WHEREAS the said [A. B.] hath requested the said [C. D.] to supply [E. F.], (a relative of the said [A. B.]), with goods on credit, which he has consented to do on the said [A. B.] entering into the agreement hereinafter contained. NOW THEREFORE, in consideration of the premises, the said [A. B.], for himself, his executors, or administrators, doth hereby undertake and agree with the said [C. D.], his executors or administrators, that he the said [A. B.], his executors or administrators, will or shall pay, or cause to be paid unto the said [C. D.], his executors or administrators, all and every such sum and sums of money, as shall from time to time be due from the said [E. F.] to the said [C. D.], for goods sold and delivered unto, or on the account, or for the use of, the said [E. F.], not exceeding on the whole the sum of £——; *Provided* nevertheless, that this guarantee shall not be considered as satisfied in the whole or in part by the payment by the said [E. F.] of any sum or sums of money, on account of goods to be supplied to him as aforesaid, but shall extend to cover the balance for the time being due from the said [E. F.] to the said [C. D.] on the account aforesaid, not exceeding the amount hereinbefore

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[J. (*a*) An agreement, like those of which this and the two following precedents consist, is required to be in writing. *Ante*, p. 278.J.]

mentioned. As witness the hands of the said parties the day and year aforesaid.J.] (*b*).

56. TO PAY FOR GOODS TO BE SUPPLIED TO ANOTHER.

(*b*) [J. An agreement of this kind is often contained in a letter, and may then be expressed as follows :—

"[*Date.*]

"Gentlemen,—In consideration of your agreeing to supply my son, [A. B.], with goods on credit, on my guarantee hereinafter contained, I hereby undertake to be answerable for the current balance, which shall or may at any time be due from him to you on account of such goods not exceeding the sum of £——; and this guarantee shall not be affected by the death or retirement of any member of your firm, or the addition of any partner or partners thereto, but shall extend to the goods supplied by the firm so altered; nor shall this guarantee prevent my said son from being liable to pay for any goods so furnished to him as aforesaid. I am, &c."J.]

[J.57. AGREEMENT *by* BANKRUPT *to* PAY *a* DEBT DUE *from him* BEFORE *his* BANKRUPTCY, *and from which he was discharged by his Certificate.*

57. BY BANKRUPT TO PAY DEBT NOTWITHSTANDING CERTIFICATE.

AGREED this —— day of ——, BETWEEN [*bankrupt*], of &c., of the one part; and [*creditor*], of &c., of the other part. Parties.

WHEREAS a commission of bankrupt some time since issued against the said [*bankrupt*], under which he was declared a bankrupt, and he has duly obtained his certificate under the said commission: AND WHEREAS the said [*bankrupt*], at the time of such his bankruptcy, was indebted to the said [*creditor*] in the sum of £——, which debt the said [*creditor*] has proved against the estate of the said [*bankrupt*], and has received two dividends (including a final dividend) thereon, amounting to the aggregate sum of £——, leaving the sum of £——, part of the said debt, unsatisfied: Recital of bankruptcy :— —of debt, —proof, —dividends.

57. BY BANKRUPT TO PAY DEBT NOTWITHSTANDING CERTIFICATE.

Intention to pay debt.

AND WHEREAS although the said [*bankrupt*] is discharged by his said certificate from all legal obligation to pay to the said [*creditor*] the sum of £——, residue of the said debt, yet he hath determined to subject himself to the payment thereof, for the consideration and in the manner hereinafter expressed: NOW THEREFORE, the said [*bankrupt*], in consideration that the said [*creditor*] hath afforded him valuable assistance to enable him to prosecute his trade or business of a —— since the said bankruptcy, and particularly has this day, at the solicitation of the said [*bankrupt*] and on the faith of the present agreement, become surety for the payment of the rent of certain warehouses at ——, let to the said [*bankrupt*], he the said [*bankrupt*], for himself, his executors, or administrators, hereby contracts and agrees with the said [*creditor*], that he the said [*bankrupt*], his executors or administrators, will pay to the said [*creditor*], his executors or administrators, the said sum of £——, the residue of the said debt, owing to the said [*creditor*] from the said [*bankrupt*], at the time of his bankruptcy, and remaining unsatisfied as aforesaid, in manner following; that is to say, the sum of £——, part thereof at the expiration of one year from the date hereof; the sum of £——, other part thereof, at the expiration of two years from the date hereof; and the sum of £——, the residue of the said debt, at the expiration of three years from the date hereof (*a*): As, &c.J.]

[J. (*a*) If with interest, add—

"with interest thereon, at the rate of £5 per cent from the date hereof, on so much of the said debt hereby agreed to be paid as shall from time to time remain unpaid, such interest to be added to and paid simultaneously with the said several instalments as they shall respectively become due."J.]

[J.58. AGREEMENT *to* PAY DEBT *contracted during* INFANCY.

58. TO PAY DEBT CONTRACTED DURING INFANCY.

AGREED this —— day of ——, 18—, BETWEEN [*debtor*], of &c., of the one part; and [*creditor*], of &c., of the other part. Parties.

WHEREAS the said [*debtor*] lately carried on and still carries on the trade or business of a ——, and in the course of his dealings and transactions in such trade or business became indebted unto the said [*creditor*] in the sum of £——; but the said [*debtor*] at the time of contracting such debt was under the age of twenty-one years, and was, therefore, it is apprehended, incapable by law of rendering himself liable to the payment of the said debt: AND WHEREAS the said [*debtor*] has now attained his majority, and as well in consideration of the advantage derived by him at his own request in respect of the said debt (*a*) and to discharge his

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[J.(*a*) It is conceived, that in the case of an agreement to pay a debt contracted during infancy, the admission of the benefit received would be a sufficient consideration to support the promise. It will be observed, that the word "debt" is here used in a moral sense, as distinguished from its legal signification; for where there is no legal obligation to pay there is in that sense no debt.J.] [The doctrine on this subject was thus laid down by Lord *Denman*, C. J., in the recent case of *Eastwood* v. *Kenyon*, 3 Per. & D. 282:—"Most of the older cases on this subject are collected in a learned note to the case of *Wennall* v. *Adney*, 3 Bos. & P. 249, and the conclusion there arrived at seems to be correct in general, that an express promise can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. Instances are given of voidable contracts—as those of infants, ratified by an express promise after age, and distinguished from void contracts—as of married women, not capable of ratification, by them when widows; *Lloyd* v. *Lee*, 1 Str. 94; debts of bankrupts, revived by subsequent promise after certificate; and similar cases. Since that time cases have

As to the consideration for a promise.

58. TO PAY DEBT CONTRACTED DURING INFANCY.

moral obligation to pay the same, as also for the considerations hereinafter mentioned, is desirous to subject himself

Promise to pay a debt void for usury.

Promise to pay a bond of suretyship given during coverture.

Consideration requisite to support an assumpsit.

occurred upon this subject which require to be more particularly examined. *Barnes* v. *Hedley*, 2 Taunt. 184, decided, that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee* v. *Muggeridge*, 5 Taunt. 36, upheld an assumpsit by a widow, that her executors should pay a bond, given by her while a *feme coverte*, to secure money then advanced to a third person, at her request. On the latter occasion, the language of *Mansfield*, C. J., and of the whole Court of Common Pleas, is very large and hardly susceptible of any limitation. It is conformable to the expressions used by the Judge of this Court, in *Cooper* v. *Martin*, 4 East, 60, where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessaries furnished to him while an infant for which, after his full age, he promised to pay. It is remarkable that in none of these cases was there any allusion made to the learned note in 3 Bos. & P. above referred to, and which has been very generally thought to contain a correct statement of the law. The case of *Barnes* v. *Hedley*, is fully consistent with the doctrine in that note laid down. *Cooper* v. *Martin*, also, when fully examined, will be found not to be inconsistent with it. This last case appears to have occupied the attention of the Court much more in respect of the supposed statutable liability of a stepfather, which was denied by the Court, and in respect of what a Court of equity would hold as to a stepfather's liability, and rather to have assumed the point before us. It should, however, be observed, that Lord *Ellenborough*, in giving his judgment, says, 'The plaintiff having done an act beneficial for the defendant, in his infancy, it is a good consideration for the defendant's promise after he came of age. In such a case, the law will imply a request, and the fact of the promise has been found by the jury.' And undoubtedly the action would have lain against the defendant whilst an infant, inasmuch as it was for necessaries furnished at his request, in regard to which the law raises an implied promise. The case of *Lee* v. *Muggeridge* must, however, be allowed to be decidedly at variance with the doctrine in the note alluded to, and is a decision of great authority. But the ground of decision there taken was also equally applicable to *Littlefield* v. *Shee*, 2 B. & Ad. 811, tried by *Gaselee*, J., at Nisi Prius, where that learned Judge held, notwithstanding that 'the defendant, having been a married woman when the goods were supplied, her husband was originally liable, and there was no consideration for the promises declared upon.' After time taken for deliberation, this Court refused even a rule to shew cause why the nonsuit should not be set aside. *Lee* v. *Muggeridge* was cited on the motion, and was sought to be distinguished by Lord *Tenterden*, because there the circumstances raising the consideration were set out truly upon the record; but in *Littlefield* v. *Shee* the declaration stated the consideration to be, that the

Debt contracted during coverture.

to the payment of the said debt in manner hereinafter contained: NOW THEREFORE, for the consideration afore-

58. TO PAY DEBT CONTRACTED DURING INFANCY.

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plaintiff had supplied the defendant with goods, at her request, which the plaintiff failed in proving, inasmuch as it appeared that the goods were in point of law supplied to the defendant's husband, and not to her. But Lord *Tenterden* added, that the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation. This sentence, in truth, amounts to a dissent from the authority of *Lee* v. *Muggeridge*, where the doctrine is wholly unqualified. The eminent counsel who argued for the plaintiff in *Lee* v. *Muggeridge*, spoke of Lord *Mansfield* as having considered the rule of *nudum pactum* as too narrow, and maintained that all promises deliberately made ought to be held binding. We do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall* v. *Adney* shews the deduction to be erroneous; if the former Lord *Tenterden*, and this Court, declared, that they could not adopt it in *Littlefield* v. *Shee*. Indeed, the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."]

Consideration requisite to support an assumpit.

Nudum pactum.

["The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would hereby be multiplied, and voluntary undertakings would also be multiplied to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult."]

[In the case now being cited, the declaration charged the defendant upon a promise to repay money laid out by the plaintiff in the maintenance of an infant, who afterwards became the defendant's wife, and in the improvement of her land, and alleging that the defendant, in right of his wife, had received the benefit of all the monies so expended. On this, Lord *Denman* proceeded to observe:—"Taking, then, the promise of the defendant, as stated upon the record, to have been an express promise, we find that the consideration for it was past, and existed long before; and yet it is not laid to have been at the request of the defendant, nor even of his wife, while sole, (though if it had, the case of *Mitchinson* v. *Howson*, 7 T. R. 348, shews that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff, and received by the defendant, with an express promise by the defendant to pay money. If the subsequent assent of the defendant could have amounted to a *ratihabitio*, the declaration should have stated the money to have been expended at his request, and the ratification should have been relied on as matter of evidence; but this was obviously impossible, because the

58. TO PAY DEBT CONTRACTED DURING INFANCY.

said, and also in consideration that the said [*creditor*] hath already assisted the said [*debtor*] by loans of money, recom-

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Consideration requisite to support an assumpsit.

defendant was in no way connected with the property, or with the plaintiff, when the money was expended. If the ratification of the wife, while sole, were relied on, then a debt from her would have been shewn, and the defendant could not have been charged in his own right, without some further consideration, as of forbearance after marriage, or something of that sort, and then another point would have arisen upon the Statute of Frauds, which did not arise as it was, but which might in that case have been available under the plea of non assumpsit."]

["In holding this declaration bad because it states no consideration, but a past benefit, not conferred at the request of the defendant, we conceive that we are justified by the old common law of England. *Lampleigh* v. *Braithwait*, Hob. 105; Smith, Lead. Cas. 67; is selected by Mr. Smith as the leading case on the subject, which was there fully discussed, though not necessary to the decision. *Hobart*, C. J., lays it down—'A mere voluntary courtesy will not have a consideration to uphold an assumpsit; but if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet is not naked, but couples itself with the suit before, and the merits of the party produced by that suit, which is the difference;' a difference brought fully out by *Hunt* v. *Bates*, there cited from Dyer, 272, where a promise to indemnify the plaintiff against the consequences of having bailed the defendant's servant, which plaintiff had done without request of defendant, was held to be made without consideration; but a promise to pay £20 to plaintiff, who had married defendant's cousin, but at defendant's special instance, was held binding. The distinction is noted, and was acted upon in *Townsend* v. *Hain*, Cr. Cas. 408, and indeed, in numerous old books, while the principle of moral obligation does not make its appearance till the days of Lord *Mansfield*, and then under circumstances not inconsistent with this ancient doctrine, when properly explained." See, also, *Hopkins* v. *Logan*, 5 Mee. & W. 241.]

A mere voluntary courtesy will not uphold an assumpsit, but a courtesy moved by a previous request will.

Consideration to support a waiver for a forfeiture.

[Where it was agreed, upon a contract of hiring, that if the servant should get drunk, at any time during the service, he should forfeit all wages due to him; it was held, that a discharge by the master after the servant had become drunk, from all forfeitures in respect thereof, was, for want of consideration, insufficient to support an action for the forfeited wages. *Monkman* v. *Shepherdson*, 3 Per. & D. 182; 9 Ad. & El. 411.]

[The statute 9 Geo. 4, c. 14, s. 5, (*ante*, p. 281), merely requires such a promise as the above, or the ratification of it, to be in writing, signed by the party to be charged therewith; and any letter referring to a debt, and bearing the signature of the party who is to pay it, is sufficient, although the name of the creditor, and the date of the promise, and the amount due, do not appear: all these particulars may be supplied by parol evidence. *Hartley* v. *Wharton*, 3 Per. & Dav. 529, overruling

58. TO PAY DEBT CONTRACTED DURING INFANCY.

mendations, and otherwise, in the conduct and carrying on of his said business, and particularly in consideration that the said [*creditor*] has this day, at the request of the said [*debtor*], induced [*certain persons, naming them*], to open an account with, and become the customers of, the said [*debtor*] in his said trade or business of a ——, the said [*debtor*], for himself, his executors, and administrators, hereby undertakes and agrees with the said [*creditor*], his executors or administrators, that he the said [*debtor*], his executors or administrators, will, on the —— day of ——, (when the credit originally agreed to be given to him in respect of the said debt will expire), pay or cause to be paid unto the said [*creditor*] the said sum of £——, and will not set up or plead his infancy as a bar to any action which the said [*creditor*] shall bring for the recovery of the same: As WITNESS &c.

Kennett v. *Milbank*, 1 Moo. & Sc. 102. See *Dickenson* v. *Hatfield*, 5 Car. & P. 46: *Bird* v. *Gammon*, 5 Scott, 213: *Lechmere* v. *Fletcher*, 1 Cr. & M. 623: *Edmunds* v. *Downs*, 2 Cr. & M. 459. If the party charged on such a promise relies on his having been under age when it was given, he must prove the fact. *Hartley* v. *Wharton*].

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59. AGREEMENT, MORTGAGEE TO PAY OFF JUDGMENTS, WHICH ARE TO BE ASSIGNED TO HIM.

59. AGREEMENT *that a* MORTGAGEE *shall apply the Money to be advanced by him towards* SATISFACTION *of the* JUDGMENT DEBTS *owing by the Mortgagor, and that the* JUDGMENTS *shall be* ASSIGNED *to the Mortgagee to protect his Estate.*

ARTICLES OF AGREEMENT entered into the —— day of ——, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. Parties.

WHEREAS the said [*mortgagee*] hath agreed to advance to the said [*mortgagor*] the sum of £——, towards satisfying the judgments mentioned in the schedule hereto; *And* by indenture of even date herewith, the said [*mortgagor*], has mortgaged to the said [*mortgagee*], divers hereditaments Recital of agreement for mortgage; mortgage;

59. AGREEMENT, MORTGAGEE TO PAY OFF JUDGMENTS, WHICH ARE TO BE ASSIGNED TO HIM.

in &c., for securing the said sum of £——, and interest, and the said [*mortgagor*] hath signed a receipt for the said sum of £—— indorsed on the said indenture of mortgage, and intends to take up more money upon mortgage to clear all the said judgments, and all other judgments entered up against him. NOW IT IS HEREBY AGREED AND DECLARED between the said [*mortgagee*] and [*mortgagor*], that the said sum of £——, is nevertheless retained and remaining in the hands of the said [*mortgagee*], and shall be applied towards satisfying the judgments mentioned in the schedule hereto, in such course and order as they stand in priority of time; *And* that the judgments so satisfied by and with the said sum of £——, shall be assigned to protect the said mortgage security from such subsequent judgments against the said [*mortgagor*] as shall remain unsatisfied, until all of such judgments shall be satisfied: AND *it is further agreed* and declared, that when all the said judgments shall be satisfied, then satisfaction of all the judgments so assigned as aforesaid shall, at the costs and charges of the said [*mortgagor*], be acknowledged and entered upon record. IN WITNESS &c.

receipt for mortgage-money;

Money to be applied in payment of judgment debts, according to priority.

Judgments to be assigned to protect mortgagee against subsequent judgments.

When all satisfied, satisfaction to be acknowledged.

THE SCHEDULE REFERRED TO IN THE ABOVE-WRITTEN AGREEMENT.

STAMPS ON AGREEMENTS.

STAMPS ON AGREEMENTS.

Stat. 55 Geo. 3, c. 184, Sch. pt. 1, *Agreement*.

[THE Stamp Act, 55 Geo. 3, c. 184, imposes a duty on every "AGREEMENT, or any minute or memorandum of an agreement, made in England *under hand only*, or made in Scotland without any clause of registration, (and not otherwise charged in this schedule nor expressly exempted from all stamp duty), where the matter thereof shall be of the value of twenty pounds or upwards, whether the same shall be *only evidence* of a contract, or *obligatory* upon the parties, *from its being a written instrument*, together with every schedule, receipt, or other matter put or indorsed thereon or annexed thereto;

Where the same shall not contain more than one thousand and eighty words (being the amount of fifteen common law folios or sheets of seventy-two words each), 1*l.*

And where the same shall contain more than one thousand and eighty words, 1*l.* 15*s.*

And for every entire quantity of one thousand and eighty words contained therein above the first one thousand and eighty words, a further progressive duty of 1*l.* 5*s.*

Provided always, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be sufficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*, although the same shall in the whole contain twice the number of 1080 words or upwards."

Letters.

Exemptions from the preceding and all other Stamp Duties.

Exemptions.

Label, slip, or memorandum, containing the heads of insurances to be made by the Corporations of the Royal Exchange Assurance and London Assurance, or by the Corporations of the Royal Exchange Assurance, of houses and goods from fire, and London Assurance of houses and goods from fire.

Insurances.

Memorandum or agreement for granting a lease or tack at rack-

Leases.

STAMPS ON AGREEMENTS.

Hire of labourer, &c.; Sale of goods.

rent of any messuage, land, or tenement, under the yearly rent of five pounds (a):—Memorandum or agreement for the hire of any labourer, artificer, manufacturer, or menial servant (b):—Memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandize:—Memorandum or agreement made between the master and mariners of any ship or vessel, for wages, on any voyage coastwise from port to port in Great Britain.

Mercantile letters.

Letters containing any agreement (not before exempted) in respect of any merchandize, or evidence of such an agreement, which shall pass by the post between merchants, or other persons carrying on trade or commerce in Great Britain, and residing and actually being, at the time of sending such letters, at the distance of fifty miles from each other (c).

All contracts, &c., exempted by statute 17 Geo. 3, c. 53, *or any other act for promoting the residence of the parochial clergy, by making provision for building, repairing, or purchasing houses and other buildings for the use of their benefices.*

All contracts, conveyances, &c. exempted by stat. 42 Geo. 3, c. 116, *or any other act relating to the redemption and sale of the land-tax.*

As to agreements exempted from stamps.

All contracts, &c., relating to the transportation of convicts.

[J. It will be perceived that Lord *Tenterden's* Act (*ante*, p. 282), exempts agreements, rendered necessary by the act to be in writing, from stamp duty (*d*). The Bankrupt Act, however, contains no such exemption. Agreements, therefore, by a bankrupt, and also agreements required by the Statute of Frauds to be in writing, must be duly stamped as such, unless they come under the exemption in the stamp act, 55 Geo. 3, c. 184.J.]

[To bring an agreement within the exemption from stamp duty as such, it must not be *under seal*, otherwise it becomes chargeable as a deed. *Vide post*, Vol. 4, p. 455.]

Stat. 23 Geo. 3, c. 58, s. 5.

[By the stat, 23 Geo. 3, c. 58, s. 5, it is provided "that no memorandum or agreement not stamped shall be deemed to be void, in case the same shall be stamped at the head office, or the said duty shall be paid thereon and a receipt given thereon for the same by the proper officer receiving such duty, within twenty-one days

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(*a*) [*Doe* d. *Hunter* v. *Boulcot*, 2 Esp. 595.]

(*b*) [*Rex* v. *Ditchingham*, 4 T. R. 769; *Rex* v. *St. Paul's, Bedford*, 6 T. R. 452; stat. 5 & 6 Will. 4, c. 19, s. 35.]

(*c*) [See *Mackenzie* v. *Banks*, 5 T. R. 176.]

(*d*) [See *Jones* v. *Ryder*, 4 Mee. & W. 32.]

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after the same shall have been entered into" and the provision remains in force as to agreements which are now charged with a duty of one pound. 55 Geo. 3, c. 184, s. 9.]

Stamp governed by the legal effect of the instrument.

What are Agreements within the Stamp Act.]—[J. The stamp to be affixed to an instrument is to be determined by the legal effect of the instrument, and not by the form which has been given to it by the erroneous opinion of the parties respecting its operation. Thus, on the one hand, an instrument assuming the language of a conveyance, but which, from its not being under hand and seal, operated simply as an agreement, has been held to be sufficiently stamped with an agreement stamp; while, on the other hand, an instrument in terms expressive as an agreement, but which in point of construction was adjudged to be a surrender, has been held to require the stamp applicable to a surrender. An instance of the former kind is afforded by the case of *The King* v. *Inhabitants of Ridgwell*, 6 B. & Cr. 665; 9 Dowl. & Ryl. 678, where, in order to establish a derivative settlement for a pauper, an instrument to the following effect was offered in evidence, bearing a 20*s.* agreement stamp. It was intitled—An agreement made, &c., between A. B. the elder, of the one part, and A. B. the younger of the other part; whereby A. B. the elder, in consideration of the affection which he bore to his son A. B. the younger, and for the further consideration of 19*l.* 19*s.*, did absolutely remise, release, and for ever quit claim unto his son A. B. the possession of a moiety of a certain tenement (describing it), To hold to his said son, and to his heirs and assigns, for ever; concluding as follows:—"And I the said A. B. the elder, nor my heirs, nor any other person or persons for me or them, or in my or their names, or in the right or stead of any of them, shall or will, by any ways or means hereafter, have, claim, challenge, or demand any estate, right, title, or interest, be it by last will or testament, or otherwise of, in, or to the said premises, or any part or parcel thereof; but from all and every action, right, title, interest, or demand of, in, or to the said premises, or any part thereof, they and every of them shall be utterly excluded and barred for ever." It was contended, that, as the parties intended this instrument as an instrument of conveyance, it ought to have borne the stamp of 1*l.* 10*s.* imposed by the statute of 44 Geo. 3, c. 98, on every deed, instrument of conveyance, &c.; but the Court held that the stamp was sufficient. Mr. Justice *Bayley* said—"Whether the stamp of 1*l.* was the appropriate stamp for this instrument, depends on the legal effect of the instrument itself. The

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Stamp depends on the effect of the instrument.

stamp act now in force [*quære*, the act in force when the instrument was executed?] imposes a duty of 30*s.* on every deed or other instrument of conveyance, surrender, lease, release, grant, appointment, confirmation, assignment, transfer, covenant, or any other obligatory instrument (not otherwise charged in the schedule), which may be enrolled. This is not a deed, because it is not under seal. It purports to operate as a conveyance of land; but it cannot so operate, because it is not a deed (*e*). It is not, therefore, a release, grant, &c. Then the only question is, does it fall within the other words 'any obligatory instrument (not otherwise charged)'? In what respect is this an obligatory instrument? It does not divest the father of his interest in any portion of the land which it purports to convey. There is one clause by which the father stipulates not to claim any estate or interest in the premises which the instrument purports to convey, and I think that that operates as an agreement by the father not to disturb the son in the enjoyment of the premises. This instrument does not operate as a conveyance of the land, but merely by way of agreement. The stamp affixed to it therefore was the proper one, and that being so, it ought to have been received in evidence." [J.]]

[[J.] The case alluded to as supplying an example of an instrument in terms expressed as an agreement, but which was construed to be, and therefore required to be stamped as, a surrender, is *Williams* v. *Sawyer*, 6 J. B. Moore, 226, where a written agreement was given in evidence, by which P. agreed to deliver up the immediate possession of the principal part of the farm he held to his lessor (the plaintiff), who, in consideration thereof, agreed to purchase the stock, &c., and to make compensation for the fallows, which the plaintiff was to enter upon immediately, and P. was to be permitted to hold one half of the barns, &c., for three months. This instrument was stamped with an agreement stamp of 20*s.*; but it was objected, that as, in point of fact, it amounted to a surrender of the term, it required a stamp of 1*l.* 15*s.* by the statute 55 Geo. 3, c. 184, Sched. Part 1, tit. "*Surrender.*" On the other side it was contended, that, although no precise form is necessary to shew a surrender in terms; yet, in order to constitute such surrender, the whole possession must be given up at the time; and here, as P. was allowed to remain in possession of part of the farm, it was a mere agreement, and not a formal surrender. But the Court was of opinion that the

(*e*) If it had been under seal, it might have operated as a covenant to stand seised. *Infra*, Vol. 4, p. 107.

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instrument operated as a surrender, it being quite clear that a party may surrender his interest in one part of the lands immediately, and the other part on a subsequent day; and therefore the objection to the stamp was well founded. [So a writing in the form of an agreement which operates as a present demise, requires a lease stamp. *Goodtitle* d. *Estwick* v. *Way*, 1 T. R. 737: *Poole* v. *Bentley*, 12 East, 168; *Rawson* v. *Eicke*, 2 Nev. & P. 423. See the cases cited, *infra*, Vol. 4, p. 266, *et seq.*]

Contract for sale of next presentation not liable to an *ad valorem* duty.

[J.In the case of *Wilmot* v. *Wilkinson*, 6 B. & Cr. 506; 9 D. & R. 620, A., by an instrument in writing not under seal, in consideration of £7000, to be paid as thereinafter mentioned, agreed to present to a rectory, on the next avoidance, such person as B., the purchaser should nominate, and to furnish an abstract of title, and execute a conveyance of the next presentation to B. This instrument was offered in evidence stamped as an agreement only; an objection was taken to its admissibility, on the ground that, if an avoidance had happened before the execution of a formal conveyance, equity would, upon the instrument in question, have decreed to the purchaser the next presentation; and that the instrument should, therefore, have had an *ad valorem* stamp upon the amount of the purchase-money: *Bayley*, J., however, answered this argument by observing, that equity might have compelled the execution of a conveyance, but that, by the stamp act, the *ad valorem* duty is imposed upon the conveyance of an interest, not upon the right to call for such conveyance: and *Littledale*, J., remarked, that the stamp must be taken as it was or was not sufficient at the time when the agreement was executed. Lord *Tenterden*, C. J., was of opinion, that whatever might be the language of the instrument, it could not operate as a grant of the next presentation, not being under seal; and he thought that the instrument was not intended so to operate. The stamp, therefore, was sufficient.J.]

What minutes of agreements within the Stamp Act.

[The clause in the act in terms extends to every minute of an agreement *under hand only*, whether the same be only *evidence* of a contract, or *obligatory* upon the parties from its being a written instrument. Upon similar words in the stat. 23 Geo. 3, c. 58, Lord *Kenyon*, in *Robinson* v. *Drybrough*, 6 T. R. 319, observed, that an agreement, though not under seal, may be declared on specially, in which case it may be said to bind the parties by its own force, or the plaintiff may in some instances, declare generally, and give the written contract in evidence. The statute was, therefore, thus particularly penned to obviate any objection which ingenuity might raise to creep out of it. A perfect agreement in

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What minutes of agreement are within the act.

writing therefore requires a stamp, and whether stamped or not, excludes parol evidence, although the agreement which it evidences might have been made without writing. See *Hearne* v. *James*, 2 Br. C. C. 309: *Bowen* v. *Fox*, 2 Man. & Ry. 167; and *ante*, p. 348. But if the writing is a mere memorandum to prevent mistakes, and not so framed and signed as to exclude parol evidence of the matters contained in it (*ante*, p. 355), though even then it cannot be produced as evidence without a stamp, yet it may be referred to by a witness, in order to refresh his memory (see *Catt* v. *Howard*, 3 Stark. 3: *Maugham* v. *Hubbard*, 2 Man. and Ry. 5; 8 B. & Cr. 14); and a signature by a person who is not authorised to bind either party makes no difference. *Rex* v. *St. Martin's Leicester*, 4 Nev. & M. 202; 2 Ad. & El. 210. There *Patteson*, J., said, that the words "under hand only" were meant to confine the operation of that part of the act to agreements which, *per se*, are binding on the parties. But this conclusion is perhaps scarcely warranted by those words, which seem rather to have been intended to exclude agreements under seal, in order to leave them to the operation of the clause imposing a higher duty on deeds not otherwise charged. And the clause expressly includes minutes of agreements which are used as *evidence* merely. Now, an unsigned memorandum may obviously be used as evidence of a parol agreement, although it does not exclude, and is liable to be contradicted by, parol evidence, which it would not be if it were signed; and if so used, it seems to fall within the terms of the act. The contrary, however, has been decided. See *Ramsbottom* v. *Tunbridge*, 2 Man. & S. 434: *Ramsbottom* v. *Mortley*, Id. 445. In the former case, an unsigned paper, delivered by an auctioneer to the lessees at a letting by auction, was offered in an action for use and occupation in proof of the terms, and an objection was taken that the paper could not be read for want of a stamp, and that it excluded parol evidence. The objection failed; but it does not clearly appear from the report whether the paper was admitted as evidence, or whether the decision was, that it did not exclude oral evidence. In the other case the circumstances were the same, except that the memorandum was signed by the auctioneer, but did not contain the lessor's name, and was therefore not binding within the Statute of Frauds (*ante*, p. 314.) Per *Dampier*, J.—"This may not be such a memorandum of the contract as would satisfy the Statute of Frauds, but it is such a memorandum of the agreement as requires a stamp. It is not evidence of the entire contract, but it is a memorandum signed by the agent of one of the parties, and surely that

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is evidence of the contract." See *Stevens* v. *Pinney*, 2 J. B. Moore, 349: *Brewer* v. *Palmer*, 3 Esp. 213. In *Drant* v. *Brown*, 5 Dowl. & Ry. 582; 3 B. & Cr. 665, a writing containing the terms of an offer made by the party signing it, was afterwards accepted by parol, and the real question appears to have been, whether the plaintiff was bound to produce the paper; but the Court went farther, and held that it was admissible in evidence without a stamp. "The stamp act only applies to agreements, or minutes or memorandums of agreements; and, therefore, unless the paper in question contained an agreement, or a minute or memorandum of agreement, it did not come within the operation of that statute." Per *Bayley*, J., and per *Holroyd*, J.—"A stamp is not necessary to every writing given in evidence to support an agreement, but only to agreements themselves, or minutes or memorandums of agreements." See *Doe* d. *Bingham* v. *Cartwright*, 3 B. & Al. 326: *Hawkins* v. *Warre*, 5 Dowl. & Ry. 512; 3 B. & Cr. 690.]

Writing signed by the plaintiff only.

[Whatever may be the authority of the above cases, it seems to be very questionable whether a recent decision at Nisi Prius on this subject can be supported. There, in an action for work and labour, and upon an account stated, the plaintiff put in a memorandum of the contract, signed by himself only, and it was held by *Williams*, J., on the authority of *Schneider* v. *Norris*, 2 Mau. & S. 286, and *Brewer* v. *Palmer*, 3 Esp. 213, that, being unstamped, the paper was inadmissible as evidence; and, being signed by one of the parties, it precluded the plaintiff from recovering independently of it. *Hughes* v. *Budd*, 8 Dowl. P. C. 478. But *Brewer* v. *Palmer* merely decided that a writing which required a stamp excluded parol evidence; and *Schneider* v. *Norris*, that a writing signed by one party could be enforced *against him*. But here the action was brought against a party who was not bound by any written agreement; and, for the purposes of that action, the plaintiff's signature was a nullity, and the writing stood no higher than mere oral testimony; so that, on the authority of *Drant* v. *Brown*, the paper was admissible without a stamp, or at least it did not exclude parol testimony, or disable the plaintiff from recovering upon a *quantum meruit*.]

Resolution entered in the books of a company.

[In *Vaughton* v. *Brine*, 1 Scott, N. R. 258, which was an action against a company for salary due to the plaintiff for services as a clerk; the plaintiff produced in evidence an unstamped resolution of the company for employing him at a certain salary, which was admitted. *Tindal*, C. J., after reading the clause in the Stamp Act, said—"This I interpret to mean, not that the duty shall be

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payable only in cases where a contract in writing is necessary, but also in any cases where any minute or memorandum is used as evidence of a contract. It must, however, be 'a memorandum of an agreement.' It appears to me that the resolution in this case was not evidence of an agreement. It does not appear that the plaintiff was present when it was made, or that it was ever communicated to him so as to make him in any way a party to it. It was a mere resolution, authorising the one party to enter into an agreement with the other, and not such an agreement as the statute contemplated." *Maule*, J., thought that the words, "whether the same shall be only evidence of a contract or" &c., were meant to exclude the excuse, that the agreement of which the memorandum is used as evidence might have been made without writing, which would in all cases not within the Statute of Frauds enable parties to give in evidence written contracts unstamped. Here the resolution might have been rescinded next day. So, *Lucas* v. *Beach*, 1 Scott, N. R. 550: and see *Frazer* v. *Bunn*, 8 Car. & P. 704; *Winbled* v. *Malmberg*, 1 Esp. 454.]

Agreement admitted for a collateral purpose.

[Where the plaintiffs had agreed to take a gun of the defendant in part payment for one to be furnished by them, and the gun, after delivery to them, had been borrowed by the defendant, it was held by Lord *Ellenborough*, C. J., that a letter written by the defendant was admissible without a stamp to explain the reason of taking away the gun, but not to prove the contract; *but that the contract might be proved by oral evidence*. *Forsyth* v. *Jervis*, 1 Stark. 437. The case, however, is very unintelligible; and the assumption that the contract required a stamp at all, seems to have been erroneous. See *Pinner* v. *Arnold*, 2 Cr. M. & R. 613; *infra*, p. 731.]

[Where a notice of dissolution of partnership was produced to prove that a partnership had subsisted, Lord *Ellenborough*, C. J., in answer to an objection for want of stamp, said, "a stamp is necessary where the instrument is used directly as an agreement, but not where it is introduced merely incidentally: otherwise it would be necessary to stamp all papers. This was only used as evidence of an acknowledgment by the defendants of a partnership having subsisted between them." *Wheldon* v. *Matthews*, 2 Chitty, 399. See *Frazer* v. *Bunn*, 8 Car. & P. 704. So, generally, any mere fact, as that A. occupies land (but not that he is tenant to B.), may be proved by parol evidence, although there may be an unstamped writing in existence by which that fact is evidenced, or which contains the contract out of which it arose. See *Rex* v. *Holy Trinity*, 1 Man. & Ry. 444: *Strother* v. *Barr*, 2 Moo. & P. 207: *Doe* v.

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Harvey, 1 Moo. & Sc. 374. And a title which arises out of a state of facts, independently of any express contract which is reduced to writing, may be proved independently of the writing. See *Davis* v. *Reynolds*, 1 Stark. 115: *Rambert* v. *Cohen*, 4 Esp. 213: *Brown* v. *Watts*, 1 Taunt. 353: *Farr* v. *Price*, 1 East, 58: *Alves* v. *Hodgson*, 7 T. R. 243: *Manley* v. *Peel*, 5 Esp. 121: *Ashby* v. *Ashby*, 3 Moo. & P. 186: *Green* v. *Davis*, 6 D. & R. 306: *Reed* v. *Battie*, 1 M. & Mal. 413: *Singleton* v. *Barrett*, 2 Cr. & J. 368: *Haigh* v. *Brooks*, 3 Per. & D. 452.]

Unstamped agreement recognised for some purposes.

[An unstamped instrument is capable of being made available by stamping, and therefore has value, and may be recovered in trover; *Scott* v. *Jones*, 4 Taunt. 868. (See *Whetwell* v. *Dimsdale*, Peake, 167): and the giving up of such an instrument is a sufficient consideration to support an *assumpsit; Haigh* v. *Brooks*, 3 Per. & D. 452.]

Proof of fraud, &c.

[An unstamped instrument may be looked at to shew fraud or illegality: *Gregory* v. *Fraser*, 3 Camp. 454: *Keable* v. *Payne*, 3 Nev. & P. 531: *Holland* v. *Duffin*, Peake, 58: *Nash* v. *Duncombe*, 1 M. & R. 104: *Coppock* v. *Bower*, 4 Mee. & W. 361: or forgery: *Rex* v. *Castle Morton*, 3 B. & Al. 589. As to when an unstamped instrument is inadmissible in criminal cases, see 3 Stark. Ev. 1382: *Keable* v. *Payne*, 3 Nev. & P. 531.]

Proposal, or prospectus, &c.

[An unstamped estimate and proposal for building, which was not finally acceded to, was allowed to be read for the purpose of reducing the plaintiff's claim according to his own estimate. *Penniford* v. *Hamilton*, 2 Stark. 475. So a printed prospectus, by which the plaintiff offered his services on certain terms, was allowed to be read in an action upon a parol contract entered into with reference to those terms: *Edgar* v. *Blick*, 1 Stark. 464. In *Williams* v. *Stoughton*, 2 Stark. 292, however, an unstamped prospectus was rejected under similar circumstances. The plaintiff produced a printed copy of the prospectus duly stamped, which was held inadmissible, not being that which had been delivered to the defendants, and which was not stamped.]

Writings held not to amount to agreements.

[It is clear, however, that a writing which neither amounts to an agreement, nor is offered as evidence of an agreement, properly so called, that is to say, a promise founded on a consideration, does not require an agreement stamp. Thus in an action for not returning bills, the following memorandum, signed by the defendant, was admitted, though unstamped:—"I have in my hands three bills, which amount to 120*l.* 10*s.* 6*d.*, which I have to get discounted, *or*

Acknowledgment.

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return on demand." It was a mere acknowledgment, and created no other contract than that which the law implied: if the defendant has bound himself to get the bills discounted, it would have been different. *Mullett* v. *Hutchinson*, 1 Man. & Ry. 522; 7 B. & Cr. 639: *Langdon* v. *Wilson*, 2 Man. & Ry. 10; 7 B. & Cr. 640. See *Remon* v. *Hayward*, 2 Adolph. & El. 666: *Huxley* v. *O'Connor*, 8 Car. & Payne, 204: *Catt* v. *Howard*, 3 Stark. 3: *Doe* d. *Frankis* v. *Frankis*, 3 Per. & D. 565. So a bought note of shares in a company, sent by a broker to his principal, was admitted to prove that the defendant (the broker) had made a certain representation to the plaintiff (the purchaser) as to the sum paid on the shares. *Tomkins* v. *Savory*, 4 Man. & Ry. 538; 9 B. & Cr. 704. So no stamp is required upon an authority by a surety, to give time to the debtor; *Hill* v. *Johnson*, 3 Car. & P. 456; or an authority to sell goods and appropriate the proceeds; *Humphreys* v. *Briant*, 4 Car. & P. 157; to pay money simply; *Parker* v. *Dubois*, 7 Car. & P. 406; 1 Mee. & W. 30: *Hutchinson* v. *Heyworth*, 1 Per. & D. 266; or an acknowledgment of having received money by a bill for a particular purpose, "which when paid would exonerate the party paying," (being on a receipt stamp); *Watkins* v. *Hewlett*, 3 J. B. Moore, 211; 1 Br. & B. 1; or a memorandum of approval of a draft, indorsed on it; *Doe* d. *Lambourn* v. *Pedgriph*, 4 Car. &

Cognovit.

P. 312; or a cognovit, unless it contains terms varying the rights of the parties, as a provision for payment by instalments, &c.; *Ames* v. *Hill*, 2 Bos. & P. 150: *Reardon* v. *Swaby*, 4 East, 188: *Rose* v. *Tomblinson*, 3 Dowl. P. C. 49: *Jay* v. *Warren*, 1 Car. & P. 532;

Notice.

or a notice of dissolution of partnership; *Jenkins* v. *Blizard*, 1 Stark. 418, unless it contains an agreement to dissolve, and is signed; *May* v. *Smith*, 1 Esp. 283; (but the cases seem scarcely

I. O. U.

distinguishable); or an I. O. U.; *Israel* v. *Israel*, 1 Camp. 499; see *Jones* v. *Ryder*, 4 Mee. & W. 32; unless it contains terms varying the liability implied by such an acknowledgment; as, that part of the debt shall be reduced in a certain event, or that payment shall not be demanded before a certain day, &c.; *Evans* v. *Phillpott*, 9 Car. & P. 270: *Brooks* v. *Elkins*, 2 Mee. & W. 74; (see *Green* v. *Davies*, 6 Dowl. & Ry. 306: *Ashby* v. *Ashby*, 3 Moo. & P. 186: *Wheatley* v. *Williams*, 1 Mee. & W. 533: *Shrivel* v. *Payne*, 8 D.

Attornment.

P. C. 441); or an attornment, unless it contain terms; *Cornish* v. *Searell*, 1 Man. & Ry. 703; 8 B. & Cr. 471: *Doe* d. *Linsey* v. *Edwards*, 6 Nev. & M. 633: 5 Ad. & El. 95; *Doe* d. *Wright* v. *Smith*, 3 Nev. & P. 335; 8 Ad. & El. 255: *Doe* d. *Frankis* v. *Frankis*, 3

Per. & D. 565; or an acknowledgment of tenancy at sufferance, though couched in the form of an agreement; *Barry* v. *Goodman*, 2 Mee. & W. 768: see *Hiern* v. *Mill*, 13 Ves. 114.] STAMPS ON AGREEMENTS.

[As to what terms inserted in a promissory note or bill of exchange will subject it to an agreement stamp; see *Smith* v. *Nightingale*, 2 Stark. 375: *Nicholson* v. *Smith*, 3 Stark. 128: *Bolton* v. *Dingdale*, 1 Nev. & M. 412: *Davies* v. *Wilkinson*, 2 Per. & D. 256: *Horne* v. *Redfearn*, 6 Scott, 260.] Promissory note.

[An agreement, the subject matter of which is not capable of being valued, as, a contract of marriage, requires no stamp as such: *Orford* v. *Cole*, 2 Stark. 351. The value must appear affirmatively, or at least impliedly. See *Rex* v. *Enderby*, 2 B. & Ad. 205: *Wrigley* v. *Smith*, 3 Nev. & M. 181: *Feltham* v. *Cartwright*, 7 Scott, 695: *Shepherd* v. *Wheble*, 8 Car. & P. 534. And in estimating the value, that which is to be done under the contract is looked at, and not the value of the thing upon which it is done; so that a contract to carry goods of a value above 20*l.*, for a consideration not amounting to 20*l.*, needs no stamp, although it contains an implied contract of insurance from loss; *Latham* v. *Rutley*, Ry. & M. 13: *Chadwick* v. *Tills*, Id. 15; and although the memorandum contain a stipulation, limiting the liability of the bailee as insurer. But perhaps a stipulation *extending* the ordinary liability of the bailee would attract the stamp. The principle of *Latham* v. *Rutley* seems to apply to an endorsement enlarging the time for performing an agreement, in which a penalty of more than 20*l.* is stipulated to be paid on non-performance; but in the case of *Bacon* v. *Simpson*, 3 Mee. & W. 78, the Court of Exchequer seemed to think that such an endorsement would require a stamp. Upon a contract for an interest amounting to less than 20*l.* in value, in a thing worth more than 20*l.* no stamp is necessary. *Doe* d. *Morgan* v. *Amos*, 2 Man. & R. 180. See *Wrigley* v. *Smith*, 3 Nev. & M. 181; 5 B. & Add. 1117. And an unstamped agreement to confess judgment for 30*l.*, to secure 5*l.* and costs, was admitted: *Ames* v. *Hill*, 2 Bos. & P. 650. See further *Shepherd* v. *Wheble*, 8 Car. & P. 534; *Remon* v. *Hayward*, 2 Ad. & El. 666.] Value of 20*l.*

[Where the same person buys several lots, none of which amounts in value to 20*l.*, though the aggregate value is greater than 20*l.*, the several contracts may be included in a single unstamped memorandum. *Emmerson* v. *Heelis*, 2 Taunt. 38: *Roots* v. *Lord Dormer*, 1 Nev. & M. 667; 4 B. & Ad. 37: see *Bacon* v. *Simpson*, 3 Mee. & W. 85. But it would probably be different if there were any- Purchase of several lots, each under 20*l.*

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Value of 20*l.*

thing to make the transaction an entire contract for the several lots; see *Baldey* v. *Parker*, 3 D. & Ry. 220; 2 B. & Cr. 37, *ante*, p. 313. Thus, in a purchase of land sold in lots, one lot may be important to the enjoyment of another: *Gibson* v. *Spurrier*, Peake Ad. Cas. 49: *Dykes* v. *Blake*, 6 Scott, 320. The case of *Chambers* v. *Griffiths*, 1 Esp. 149, cannot now be followed in all its generality. *Drewe* v. *Hanson*, 6 Ves. 675: *Casamajor* v. *Strode*, 2 Myl. & K. 724.]

Progressive duty.

[In ascertaining the number of words in an agreement, which included particulars of sale, a mere repetition of the description of the property was not counted. *Lord Dudley* v. *Robins*, 3 Car. & P. 26. Figures are counted as words, Ib.; and names in a map referred to, are counted, *Wickens* v. *Evans*, 4 Car. & P. 359. Where several persons agreed to pay their proportions of certain costs, according to the sums subscribed by each, and set opposite their respective names; and the words of the agreement, when counted with each name and signature, down to and including that of the defendant, or when counted with all the signatures, omitting the sums, were fewer than 1080; but including all the sums and signatures, exceeded that number; it was held, that as every sum and signature was necessary, and must be read in order to ascertain the sum to be paid by each subscriber, a 1*l.* 15*s.* stamp was necessary. *Linley* v. *Clarkson*, 1 Cr. & M. 436. The stamp-office receipt for the penalty paid on stamping an agreement is not counted: *Bowring* v. *Stephens*, 2 Car. & P. 337.]

Letters.

[An agreement constituted by a series of letters, containing in the whole less than 1080 words, seem to require a 1*l.* stamp only. *Perkins* v. *Moravia*, 1 Car. & P. 376.]

Several papers.

[The clause as to letters applies to any detached papers, not in the form of a correspondence, but connected together by internal evidence, and a stamp of the proper amount on one of them is sufficient. *Pearce* v. *Cheslyn*, 5 Nev. & M. 652: *Peate* v. *Dicken*, 1 Cr. M. & R. 422. See *Veal* v. *Nicholls*, 1 M. & Rob. 248.]

Reference to unstamped schedule does not invalidate deed.

[J. In the case of *Duck* v. *Braddyll*, M'Clel. 217, *S. C.* 13 Pri. 455, it was contended that a lease was void, because it referred to certain inventories or schedules which were not stamped; but Lord C. B. *Alexander* overruled the objection, remarking, that as they were not attempted to be given in evidence, it was not material, there being no provision in the stamp laws which made void a deed given in evidence because it referred to inventories which were not stamped. The inventories referred to were of course detached pa-

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Writings referred to.

pers; for if they had been indorsed on or annexed to the deed in question, they would have formed a component part of such deed, and which in that case ought to have borne a stamp adequate to include them, otherwise *no* part of the deed would have been admissible in evidence.[J.] [*Wickham* v. *Evans*, 4 Car. & P. 359; and the stamp must cover a paper referred to, although it is annexed after the execution of the principal writing, if that refers to it as annexed. *Veal* v. *Nicholls*, 1 M. & Rob. 248.] [[J.] In the case of *Lake* v. *Ashwell*, 3 East, 326, a bill of sale of goods under seal executed as a security was offered in evidence, which had an inventory of the goods annexed to it. The bill of sale itself had the proper deed stamp, but the inventory was stamped with the schedule stamp only: it was objected that the inventory annexed and referred to in the bill of sale was part of the same deed, and ought to have a deed stamp, and the Court was of this opinion. Lord *Ellenborough* said —"The meaning of the clause in the act of Parliament was, that if any schedule or inventory of goods were unattached to or making part of anything else which required a different stamp, it should have the stamp of 2*s*. 6*d*. (*g*) thereby imposed; but that if the schedule were annexed to and formed part of any other instrument which required a specific stamp, it must have the proper stamp required for that instrument of which it is a part. And if this were not so, the revenue would be liable to great evasion; for then an instrument requiring a certain stamp in proportion to the number of words, would only contain a few words of reference to a schedule, by which every thing would be conveyed for a trifling stamp, in fraud of the revenue.[J.]]

Stamp imposed on schedules.

[[J.] This case arose on the statute of the 37th Geo. 3, c. 90. The act of the 55 Geo. 3, c. 184, is very explicit on the point. The clause imposing a duty on schedules is as follows:—"Schedule, inventory, or catalogue of any lands, hereditaments, or heritable subjects, or of any furniture, fixtures, or other goods or effects; or containing the terms and conditions of any proposed sale, lease, or tack, or the conditions and regulations for the cultivation or management of any farm, lands, or other property, leased or agreed to be leased; *or containing any other matter or matters of contract or stipulation whatsoever;* which shall be referred to, in, or by, and be intended to be used or given in evidence as part of, or as material to any agreement, lease, tack, bond, deed, or other instrument, charged with any duty in this schedule, but which shall be *separate*

(*y*) This is now 1*l*. 5*s*.; *vide* act 55 Geo. 3, c. 184, tit. "*Schedule*."

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Schedules.

and distinct from, and not indorsed on, or annexed to such agreement, lease, tack, bond, deed, or other instrument, 1*l.* 5*s.* And if the same shall contain 2160 words or upwards, then for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of 1*l.* 5*s.*" "*Printed proposals published by any corporation or company respecting insurances, and which shall be referred to, in or by any policy or instrument of insurance issued by such corporation or company,*" are exempted from stamp duty.[J.]

Proposals of insurance office.

[J. As the legislature has now charged schedules with a stamp duty nearly equal to the progressive duty on deeds, little is saved by referring to separate schedules, and it is seldom done. The usual and better course is to indorse on or attach to the deed any schedule or inventory containing additional matter that cannot conveniently be embodied in the deed, and then, in computing the folios, the schedule is included as a matter of course. In this computation allowance must be made for the memorandum subscribed by, and the subscription of, the attesting witnesses; but the memorandum usually indorsed, denoting the date, parties' names, &c., need not be included. *Winder* v. *Fearon*, 7 Dowl. & Ryl. 185; 4 Barn. & Cr. 663.J.] [*Doe* d. *Wright* v. *Smith*, 3 Nev. & P. 341.]

Stamped instrument may be referred to.

[J. But, though generally a paper, writing, or document, cannot be referred to without being stamped either as part of the instrument or as a separate schedule, it seems that an instrument may refer to and adopt the contents of another instrument properly stamped (*Turner* v. *Power*, 7 B. & Cr. 625), without requiring or subjecting the instrument referred to, to any additional stamp; and, therefore, where the plaintiff produced in evidence three agreements, the first being a contract for the sale of certain real property; the second, altering the terms of the former agreement, and providing that all disputes between the parties should be submitted to arbitration; and the third, which was indorsed on the second, making some farther alterations, and declaring that the provision for arbitration contained in the second agreement should extend to that (the third) agreement, and to every clause therein contained, in like manner as if the same had been therein repeated; and it was contended that the third agreement ought to bear a stamp sufficient to cover the arbitration clause referred to in it, which was to be considered as actually embodied in the agreement; the objection was decided to be untenable. Lord *Tenterden* said—The duty is imposed by the 55 Geo. 3, c. 184, upon the words contained in the instrument itself, together with "every schedule or receipt, or other

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matter put or indorsed thereon or annexed thereto." In *Lake* v. *Ashwell*, 3 East, 326, the schedule was annexed to the deed in the very words of the act of Parliament; in the present case the words of the clause of reference were not in the instrument, nor in any schedule, receipt, or other matter put or indorsed thereon or annexed thereto. *Attwood* v. *Small*, 7 Barn. & Cr. 390; 1 Man. & Ry. 246; 2 You. & J. 72.]

Remarks upon the case of *Attwood* v. *Small*.

[In treating this case as deciding that a stamped instrument may be referred to without requiring or subjecting the deed which refers to it to an additional stamp, I have regarded rather the facts of the case than the arguments contained in the judgment, between which there is some incongruity; for Lord *Tenterden*, it will be observed, rests the decision of the Court solely on the ground of the instrument referred to not being matter annexed to or indorsed upon the agreement in question, and not on that of its being a stamped instrument, though it is explicitly stated in the report that the third agreement *was* indorsed upon, *and therefore necessarily had upon its own back* the second agreement to which it refers. If we exclude from our consideration, therefore, the fact of the second agreement being a stamped instrument, the case would be directly in the teeth of the act of Parliament. It would lead to much inconvenience if parties were not allowed to refer to an existing instrument; and on this account, as well as of the impossibility of supporting the case of *Attwood* v. *Small* on any other ground, it is probable that it would be considered as authorising such a conclusion. It seems to follow, that if an annexed stamped instrument can be referred to without being considered as part of the instrument which refers to it, a disannexed stamped instrument may be referred to without requiring a scheduled stamp.] [See *Strutt* v. *Robinson*, 3 B. & Ad. 395: *Bacon* v. *Simpson*, 3 M. & W. 89.]

Sale of goods.

Contract containing collateral stipulations.

[A contract for the sale of goods comes within the exemption, although it contains collateral stipulations as to the mode of payment, &c. *Heron* v. *Granger*, 5 Esp. 269; *Ellis* v. *Ellis*, Gow, 216. So, an agreement for the sale of a ship, part of the price to be secured by mortgage of the ship, the vendor to charter the ship, &c. *Meering* v. *Duke*, 2 M. & Ry. 121. See also *Venning* v. *Leckie*, 13 East, 7: *Whitworth* v. *Crockett*, 2 Stark. 431; *Marsons* v. *Short*, 2 Scott, 243, *ante*, p. 312, where the memorandum contained an agreement that the horse, a share in which was the subject of sale, should be entered to run at certain races.]

[But an undertaking by a principal to provide for bills drawn

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Sale of goods.

upon his factor, if goods then or to be placed in the factor's hands should remain unsold at the maturity of the bills, was held not to relate to the sale of goods, as its primary object, so as to fall within the exemption. *Smith* v. *Cator*, 2 B. & Al. 778. But guarantees for the price of goods sold or to be sold, may be made without stamp. *Watkins* v. *Vince*, 2 Stark. 368: *Warrington* v. *Furbor*, 6 Esp. 89; 8 East, 242: *Waddington* v. *Bristow*, 2 Bos. & P. 452. See *Curry* v. *Edensor*, 3 T. R. 524.]

Goods and goodwill.

[A contract for the sale of "two flies at 60*l*., harness and *goodwill* included," was held to require a stamp. Per *Tindal*, C. J.—"Suppose this had been an agreement for the sale of the plant, *and goodwill* of a brewery or distillery, could it be said that the agreement related merely to a sale of goods?" *South* v. *Finch*, 4 Scott, 293. But see remarks on *Pinner* v. *Arnold*, *infra*, p. 731. See *Leigh* v. *Banner*, 1 Esp. 403.]

Goods not in existence; work and labour.

[A contract for the sale of goods, whether in existence at the time or not, to be made and delivered in a perfect state by the seller, seems, notwithstanding some former doubts, (see *Waddington* v. *Bristow*, 2 Bos. & P. 452, *ante*, p. 291: *Boydell* v. *Drummond*, 11 East, 150), to fall within the exemption. See *Watts* v. *Friend*, 10 B. & Cr. 446: *Evans* v. *Roberts*, 8 Dowl. & Ry. 611: *ante*, pp. 294, 311. Thus, in *Wilks* v. *Atkinson*, 6 Taunt. 11, a contract for selling and delivering oil, not yet expressed from seed in the vendor's possession, was held to be within the exemption. Per *Gibbs*, C. J.—"A baker agrees to produce me a loaf to-morrow; he has not the bread, but he has the flour, and is to make it into bread and deliver it. How often does a butcher contract to deliver meat when he has not the meat, and the beast is not yet killed? It is out of all common sense to say this is not a contract relating to goods, wares, and merchandizes." See *Ingram* v. *Lee*, 2 Camp. 521. So an unstamped memorandum of a contract for marble chimney-pieces, containing an agreement by the vendor to finish them in a tradesmanlike manner, was admitted. *Hughes* v. *Breeds*, 2 Car. & P. 159. But there it did not appear that the goods did not exist at all at the date of the contract. In another case, however, the goods clearly did not exist at the time in the possession of the vendor, the contract being for the supply of water to a house by a water company; and it was held, that no stamp was necessary. *West Middlesex Water Works Company* v. *Suwercrop*, 4 Car. & P. 87. That case seems to fall strictly within the rule as to crops established by the recent cases on the Statute of Frauds, *ante*, p. 294.]

[In *Buxton* v. *Bedall*, 3 East, 303, a contract for four spinning-

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mules to be made by the vendors, but containing no stipulation for fixing them in the purchaser's premises, was held to require a stamp as being a contract *in fieri*, not for the sale, but for the making of goods. (See also *Forsyth* v. *Jervis*, 1 Stark, 437, *ante*, p. 722). This case was overruled in the recent case of *Pinner* v. *Arnold*, 2 Cr., M. & R. 613, where an agreement for the making of a press, to be delivered within three months, was admitted without a stamp. Per *Parke*, B.—"This is nothing more than a contract to *sell* and deliver a copper-plate printing press of the plaintiff's manufacture; if it had appeared that part of the contract was to fix it to the floor or the walls of the defendant's house, I should have doubted whether it was a contract for the sale of goods, within the meaning of the act; because that would be the same in principle as a contract to erect a pillar. In this case, however, it does not appear to be any part of the contract that it should be so fixed; and its having been put together in the defendant's shop can make no difference in the nature of the contract. I consider the case of *Buxton* v. *Bedall* as overruled by the subsequent cases of *Wilks* v. *Atkinson*, and *Garbutt* v. *Watson*." In the course of the argument the same learned Judge observed—"The distinction is, that if you, employ a tailor to make a coat, and deliver it to you, his remedy is for goods sold; but that if you employ him to mend a coat for you, his remedy is for work and labour." See *Atkinson* v. *Bell*, 2 Man. & Ry. 292. From some other observations which fell from the court in the course of the argument, it would appear that every contract which would be considered as a sale of goods, &c., within the 17th section of the Statute of Frauds, (*vide ante*, p. 311), would fall within the exemption in the stamp act.]

Pinner v. *Arnold.*

[As to the observation in the judgment just cited, that, if part of the contract had been to fix up the press, the writing might have required a stamp, it is to be remarked that the exemption extends to all agreements, &c. "made for *or relating to* the sale of any goods, &c.;" and if the principal subject of the contract appears to have been the sale of goods, a collateral stipulation on a minor point would be considered as merely auxiliary to that, and insufficient to take the case out of the saving. *Vide ante*, p. 296: and *Doe* d. *Phillips* v. *Phillips*, 3 Per. & D. 603. Thus, a contract with a bricklayer to erect a brick pillar stuccoed, might be well treated as a contract for work and labour, rather than goods; at the same time that a contract with a sculptor, for the purchase of a marble column or a statue, to be finished on his own premises and erected by him on

Collateral matters.

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the purchaser's, might be treated as a contract for goods to be delivered.]

Abandonment of contract for sale of goods.

[An agreement for the abandonment of an existing contract for the sale of goods, and for the future sale of goods on different terms, is within the exemption. *Whitworth* v. *Crockett*, 2 Stark. 431.]

Horse.

[A contract for the sale of a horse, or of a part interest in a horse, requires no stamp. *Marson* v. *Short*, 2 Scott, 243.]

Fixtures.

[Fixtures, it seems, do not come within the description of goods, wares, or merchandizes; and all contracts respecting the sale of them must be stamped. *Wick* v. *Hodgson*, 12 J. B. Moore, 213; 2 Scott, 249. See *Hallen* v. *Runder*, *ante*, p. 296; and as to crops, *ante*, p. 290.]

Contract under seal for sale of goods.

[A contract for the sale of goods, contained in a deed, whether as accessory to some other subject or not, renders the instrument liable to a stamp as a deed not otherwise charged. *Clayton* v. *Burtenshaw*, 7 Dowl. & Ry. 800; 5 B & Cr. 41. See *Robinson* v. *Drybrough*, 6 T. R. 317.]

As to instruments executed abroad.

[No country ever takes notice of the revenue laws of another, (per Lord *Mansfield* in *Holman* v. *Johnson*, Cowp. 343: see *Le Cheminant* v. *Pearson*, 4 Taunt. 367: and *Boucher* v. *Lawson*, Cas. tem. Hard. 85), and therefore an instrument made abroad is generally admissible in evidence here without a stamp. Thus, in *James* v. *Catherwood*, 3 Dowl. & Ry. 190, unstamped receipts for money were admitted in proof of a loan made in France: *Abbott*, C. J., said—"It would be productive of prodigious inconvenience if in every case in which an instrument was executed in a foreign country we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." See also *Wynne* v. *Jackson*, 2 Russ. 351.]

[In *Clegg* v. *Levy*, 3 Camp. 166, (A. D. 1812), an unstamped agreement executed at *Surinam* was allowed to be read, on the ground that the objecting party did not sufficiently prove that a stamp was required by the law of the place. Lord *Ellenborough* said—"A contract must be available by the law of the place where it is entered into, or it is void all the world over." So, in *Alves* v. *Hodgson*, 7 T. R. 241, a written contract not duly stamped according to the law of *Jamaica* was rejected by Lord *Kenyon*, C. J., who observed—"It is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory here."]

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[Both of the above cases arose in respect of English colonies; and the dicta which seem to extend the rule to foreign countries not subject to the reigning sovereign of England, must be taken to have been overruled in the case of *James* v. *Catherwood*. All contracts and other instruments executed in a foreign country, so far as they confer or are used as evidence in enforcing rights of a personal nature against the party executing them abroad, although relating to real property in England, seem therefore to require no stamp at all: but a deed of *conveyance* of real estate in England would probably be held to be subject to the English stamp laws wherever it might be executed; for such instrument could never have been enforceable, or have had any validity or effect as a conveyance, in a foreign court.]

Instruments executed abroad.

Conveyance of lands.

[The doctrine of *James* v. *Catherwood* has, however, been loudly impugned by Judge *Story* in his learned Commentaries on the Conflict of Laws, on the ground that an instrument which is void for want of due solemnities in the place where it was executed cannot be valid elsewhere. And there seems to be some force in the objection, where, by the law of the place, the instrument is incurably void, unless stamped previously to execution; but if the law allows the stamp to be affixed after execution, then it is a mere rule of evidence, or *lex fori*, and can no more be taken notice of in a foreign court than a law of limitation, which bars the remedy merely, and not the right. See *Don* v. *Lippman*, 5 Cl. & Fin. 1. Indeed, when it is considered that even a law which absolutely avoids a contract for want of a stamp is a mere fiscal penalty, and quite collateral to the making of the contract as between the parties, it may be doubted whether the rule which refers the validity of a contract to the law of the place where it was made, can properly be extended to such a law as that.]

[Instruments executed in England, although intended to be acted upon abroad, must bear an English stamp. See *Stonelake* v. *Babb*, 5 Burr. 2653.]

[Instruments executed out of England are, at all events, sufficiently stamped with the stamp required by the law of the place of execution. *Snaith* v. *Mingay*, 1 Mau. & S. 87: *Jordaine* v. *Lashbrooke*, 7 T. R. 601: *Holdsworth* v. *Hunter*, 10 B. & Cr. 449; 5 Man. & Ry. 393. But a statement of the place of execution on the face of the instrument does not exclude parol evidence that it was, in fact, executed elsewhere. *Jordaine* v. *Lashbrooke: Ex parte Manners*, 1 Rose, 68. In *Ximenes* v. *Jacques*, 1 Espin. 311, an

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agreement, purporting to have been executed at sea, was received without a stamp. See *Winbled* v. *Malmberg*, 1 Esp. 454.]

Deed cannot be used in a second transaction between the same parties, without being re-stamped.

[J. Of course, a deed which has once performed its office, cannot be used in a second transaction to which the terms of it may happen to apply. Thus, in the case of *Hammond* v. *Foster*, 5. T. R. 635, where A. granted a redeemable annuity to B., which he redeemed, paying over the redemption-money to B.'s attorney, from whom he received the annuity deeds cancelled. A. afterwards applied to the attorney to procure him more money, who informed him that he had not paid over to his client the money he had received for redeeming the annuity, and that he would re-deliver to A. that sum on receiving back the deeds. This was done, and one of the grounds for an application to the Court for setting aside the annuity was, that it was an entirely new transaction, and that there ought to have been new stamps on the deeds; and of this opinion was the Court.J.]

Deed cannot be added to, after execution, without a fresh stamp.

[J. Where a material addition has been made to a deed after all the circumstances essential to its operation are complete, this additional matter requires to be stamped as a separate instrument, whether it is written upon the same piece of parchment or not. Thus, where A., by indenture dated the 30th of November, 1793, granted to B. an annuity of £60, on which indenture was found the following indorsement, dated the 5th of December, 1793:—" Memorandum, that, at the time of the execution of the within-written indenture, it was agreed by and between the within-named J. Weatherhead and P. Schumann, that W. should be at liberty at any time to redeem the within-mentioned annuity, on giving six months' notice in writing to S., and paying the whole of the arrears then due," &c. Signed by both parties, and witnessed. The Court was of opinion that the indorsement could not be received in evidence; because, though written on the same parchment, it appeared to have been executed at a different time from the indenture, and was not stamped as a separate instrument. *Schumann* v. *Weatherhead*, 1 East, 537.J.] [*Bacon* v. *Simpson*, 3 Mee. & W. 787; *ante*, p. 725: *Stephens* v. *Lowe*, 2 M. & Sc. 44: *Taylor* v. *Parry*, 1 Scott, N. R. 576, where, by a memorandam dated the 14th of May, it was agreed to refer a dispute respecting boundaries to a surveyor residing at a distance from the spot; and, by an indorsement dated May 25, stating that the parties had not been able to appoint a surveyor residing out of the neighbourhood, it was agreed that E. W., who

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Alterations.

resided in the place, should be the referee; and it was held that one stamp was sufficient.] [J. On the same principle, it is clear that an alteration cannot be made in a bill of exchange, after it is issued, without a fresh stamp. *Knill* v. *Williams*, 10 East, 431: *Bathe* v. *Taylor*, 15 East, 412: *Downs* v. *Richardson*, 5 B. & Al. 680: *Bowman* v. *Nicholl*, 5 T. R. 537.J.] [See *Spicer* v. *Burgess*, 1 Cr., M. & R. 129: *Byron* v. *Thompson*, 3 Per. & D. 71: *Knight* v. *Clements*, 3 Nev. & P. 375: *Atten* v. *Farren*, 5 C. & P. 513.]

Correction of a mistake, which was essential to the operation of the deed, does not subject it to a fresh stamp.

[J. But it is clear that an alteration made in a deed, by merely correcting the mis-statement of a fact, and not arising from any change of intention in the parties, and more especially if the instrument were previously incapable of legal operation, does not, nor does the re-execution of the deed consequent on such alteration, subject it to a fresh stamp; and therefore, where, after the execution of a bill of sale of a ship, it was discovered that the certificate of registry was mis-recited, whereupon the error was rectified and the deed was re-executed, but without any new stamp, an objection to its admissibility in evidence on this account was overruled. Lord *Ellenborough* said—"This bill of sale, when first executed, was, from the mistake in the recital of the certificate of registry, to all intents and purposes null and void; it took no effect whatever from its first delivery, and the stamp impressed upon it was wholly inoperative. This defect arose not from intention, but from mistake. The instrument, as first executed, was not what the parties meant to execute, and it was not in the state in which it was at first intended to be till it was altered. This is not the case of substituting a new and second contract in the place of a preceding effectual one, upon a change of intention in the parties, but merely making the contract what it was originally intended to have been; and in such a case, where the instrument upon its first execution was void to all intents and purposes, where its insufficiency arose from a mere mistake, where, in consequence of that mistake, it was not in the state in which it was intended to have been when it was so executed, and where, upon its second execution, it is only put into that state in which it was originally intended to have been, we think it is not goingbeyond the fair spirit of the stamp laws to hold that, upon such second execution, being the first which was effectually operative, a new stamp was not requisite." *Cole* v. *Parkin*, 12 East, 471.J.]

Error in fact allowed to be corrected.

[J. And the same rule was followed in another instance where the alteration was merely designed to correct an error, and did not spring from altered intention, though the error was not, as in the last case, of a nature wholly to prevent the deed from taking effect.

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Thus, in the case of *Robinson* v. *Touray*, 1 Mau. & Selw. 217, it was held, that a mistake in a policy of insurance made by the agent, in declaring the interest in the margin of the policy to be on a ship by a wrong name, might be rectified, by inserting the true name, without a fresh stamp (*a*).[J.] [*Sanderson* v. *Symons*, 4 J. B. Moore, 42; 1 Br. & B. 426.]

[In a case at *Nisi Prius*, indeed, Lord *Kenyon* seems to have ruled that no additional stamp was rendered necessary by a memorandum indorsed on a deed several years subsequently to its execution, though the object of the alteration was to vary the stipulations of the deed. The facts were shortly as follow:—A. and B., the plaintiffs, being about to marry, the defendant agreed to advance £1000 as a marriage portion; and, to secure it, the plaintiffs entered into a deed, dated the 1st of August, 1792, by which, (among other things) they agreed to transfer £2000, Three per Cents., to the defendant; which was accordingly done. In January, 1798, a memorandum was indorsed on the deed, by which it was agreed, that the defendant should not transfer, or otherwise dispose of the stock, without giving six months' notice to the plaintiffs. This indorsement was not stamped. It was objected for the defendant, that, on this account, it could not be given in evidence. Lord *Kenyon* said, he was of opinion it did not require any stamp; and instanced the case of mortgage-deeds, in which it had formerly been customary to make indorsements, altering the rate of interest from £5 to £4 per cent.; on which occasions a new stamp had not been held necessary. His Lordship therefore admitted it in evidence; and the plaintiff had a verdict. *Herne* v. *Hale*, 3 Esp. 237.]

[As this was a *Nisi Prius* decision only, and as great stress has, we have seen, generally in the recent cases been laid upon the fact of the alteration of the deed *not* having been the consequence of any new intention of the parties, as negativing its liability to a fresh

As to alterations in policies of assurance.

(*a*) [J. Policies of marine insurance are under particular statutory regulations with respect to alterations subsequent to execution. The stat. 35 Geo. 3, c. 63, s. 13, provides that no additional stamp shall be requisite on account of any such alteration, if the premium shall exceed 10*s. per cent.*, and the thing insured shall remain the property of the same persons, and the alterations shall not prolong the term beyond the period allowed by the act, and so that no additional sum should be insured by reason of the alteration. And it has been held, that a change of destination from Quebec to St. John's, New Brunswick, was within the act, and therefore did not subject the policy to a new stamp. *Brocklebank* v. *Sugrue*, 1 Barn. & Ad. 81. See also *Ramstrom* v. *Belt*, 5 Mau. & S. 267: *Kensington* v. *Inglis*, 8 East, 273.J.] [*Sanderson* v. *Symonds*, 4 J. B. Moore, 42; 1 Br. & B. 426: *Forshaw* v. *Chabert*, 6 J. B. Moore, 369. *Weir* v. *Aberdeen*, 2 Barn. & Al. 325.]

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stamp, it would not be safe to consider the case as an authority for the exemption, where the alteration arose from any change in or addition to the original intention or agreement of the parties, as in the instance before the Court, or that adverted to in the judgment. Indeed, no one would think of indorsing an agreement varying the rate of interest payable under a mortgage-deed long since executed, without an additional stamp.[J.] [See *Goodright* d. *Nicholls* v. *Mark*, 4 Mau. & Sel. 30, stated *infra*, Vol. 4, p. 448. In *Robson* v. *Hall*, Peake, 128, a memorandum of a wager with an indorsement made after execution, doubling the amount of the bet, was held by Lord *Kenyon* to require two stamps. That case, however, proceeded on the ground that there were two distinct bets, and the paper was received in evidence as to the first bet. But generally an alteration in the terms of an agreement puts an end to the old agreement; and, although not stamped, may be looked at to shew that the old agreement is at an end, whether it is made by an indorsement or by a separate writing, on the same principle that an unstamped writing may be looked at to exclude parol evidence of the matter to which it relates. *Reed* v. *Deere*, 2 Car. & P. 624; 7 B. & Cr. 261: *Sweeting* v. *Halse*, 4 Man. & Ry. 287; 9 B. & Cr. 365.]

Unstamped variation looked at for some purposes.

Alteration of deed, while *in fieri*, does not subject it to a fresh stamp.

[J. It is clear, that an alteration made in a deed while it was *in fieri*, having been executed by some only of the parties to it, does not subject it to an additional stamp. Thus in the case of *Matson* v. *Booth*, 5 Mau. & Sel. 223, where it appeared that, after a bail-bond had been executed by some of the bail, but before the bond had been accepted by the sheriff, the name of another obligor, with the concurrence of those who had executed it, was added; it was held that the bond was not rendered void by this alteration, and that no additional stamp was necessary; for never having been out of the hands of the obligors, the bond was to be considered, at the time of the addition, as in the nature of an escrow.[J.] [So in *Lyburn* v. *Warrington*, 1 Stark. 162, an indorsement made on a deed after signature, but before the sealing and delivery, was admitted without a new stamp; and the insertion of the name of a second witness after execution, but before delivery to either witness, was held good. So, an alteration in a bankrupt's certificate before allowance. *Ex parte Sawyer*, 17 Ves. 244.]

As to escrows.

[J. The subject of escrows is fully treated of under the title "ATTESTATION," *infra*, and therefore it will be sufficient to observe here, that the ancient doctrine has been much relaxed by modern adjudications: and it is now established, that, even if an instrument be executed as the *deed* of the party, and not in terms as an escrow;

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yet, if it be accompanied by an understanding or agreement for postponing its operation until some future event or period, this will constitute it an escrow. See *Johnson* v. *Baker*, 4 B. & Al. 410: *Murray* v. *Earl of Stair*, 2 B. & Cr. 82; 2 D. & Ry. 278: *Matson* v. *Booth*, 5 Mau. & S. 223: *Hudson* v. *Revett*, 5 Bing. 368, stated in *Spicer* v. *Burgess*, 1 Cr., M. & R. 129. Upon the same principle of liberality greater scope has been given than formerly to alterations made subsequently to the execution of the instrument, where they had been made with the privity of the parties interested, and without any fraudulent intention; and such alterations have been held not to affect the validity of the instrument in instances where according to the old doctrine they would certainly have had that effect (*a*). *Waugh* v. *Russell*, 1 Marsh. 311: *Coke* v. *Brummell*, 2 J. B. Moore, 495: *Worral* v. *Jacob*, 3 Mer. 756: *Hudson* v. *Revett*, 5 Bing. 368: *Collins* v. *Prosser*, 1 B. & Cr. 682; 3 Dowl. & Ry. 112: *Hall* v. *Chandless*, 12 J. B. Moore, 316; but see *Adams* v. *Bateson*, 3 Moo. & Pay. 339.[J.]

Alteration after execution, by *some* of the parties.

[J. In these cases no question was raised as to the sufficiency of the stamp, with the exception indeed of *Hall* v. *Chandless*, which seems to have decided that an alteration made in a deed after its execution by some of the parties, who were not the principal agents in the transaction, being merely passive or concurring parties, *and were not interested in the alteration*, did not subject it to a fresh stamp. The circumstances were as follow:—A. had contracted to grant a lease to B., and C. had contracted to grant an underlease to C. and D. There being some difficulties with respect to the rents to be secured to A. and B., which induced A. to refuse to grant an immediate lease to the intended lessee, it was arranged that a lease should be granted by A. to E., upon trusts; and accordingly an indenture was prepared, by which A. demised to E., in trust for himself, until a certain rent agreed to be reserved to him by B. should be secured, and afterwards in trust for B., until a certain rent to be reserved to him by C. and D. should be secured, and afterwards in trust for C. and D. This lease had been executed by B., C., and D., (but not by A. or E.), when it was discovered that a piece of ground had been improperly included in it; whereupon an alteration was made in the parcels of the lease, by striking out certain words; and the indenture so altered was afterwards executed by A. and E., without any additional stamp being imposed. The alteration was made with the knowledge and at the request of B., but not with the

(*a*) [J. This subject, as well as the kindred one as to the effect of deeds remaining with the grantor, is fully discussed *infra*, Vol. 2, 2nd Ed. 653 *b*, 666 *b*.J.]

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privity of C. and D., who were not at all interested in it. On a case from Chancery the question for the opinion of the Court of Common Pleas was, whether the lease in question was a valid deed notwithstanding the alteration; and the Court certified that it was valid, the alteration not having been made after the execution by the lessor and lessee.[J] [See *Knight* v. *Crockford*, 1 Esp. 190: *Jones* v. *Jones*, 1 Cr. & M. 721; *infra*, Vol. 4, p. 448.]

Several distinct transactions cannot be included in one stamp.

[[J] It is not allowable, except in the instances particularised in the stamp act, for persons to include in one stamp several distinct and unconnected transactions; and therefore, if A. owes B. a sum of money, and C. owes D. a sum of money, B. and D. could not take from their respective debtors a bond for the payment of their several debts by one instrument having only a single stamp, though the stamp were sufficient to cover a bond for the aggregate sum; and even if the obligee or the obligor were the same person, that is, if two creditors, owing distinct independent debts, bind themselves to their common debtor (but not one for the other), or one debtor, owing to two different persons two distinct independent debts, becomes bound to his several creditors, by the same instrument, for the payment of the requisite debts, it must bear a separate stamp for each obligation, there being no community of interest or purpose between the respective parties. Again, though it is clear that the legatees under a will may join in releasing the executor, in a deed bearing one stamp only; yet, if a person were executor under several wills, it is apprehended that the legatees under all the wills could not join in one deed of release, without subjecting the deed to a number of stamps equal to the number of wills. The distinction on this subject is thus stated in Phillips on Evidence, Vol. 1, p. 490, 6th Ed., in a passage which is often cited:—"If the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all the parties, there a single stamp will be sufficient; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party."[J]]

Assignment of shares in a common fund held to require one stamp only.

[[J] The first branch of this proposition may be illustrated by numerous cases. Thus, in the case of *Baker* v. *Jardine*, cited 13 East, 235, it was held that a bill of sale by several mariners, part of the crew of a privateer, of their respective shares of prize-money, did not require more than one stamp. So, in the case of *Davis* v. *Williams*, 13 East, 232, an agreement by several for a subscription

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to one common fund, viz. for making a wet dock at Bristol, though several as to each subscriber, was held to be admissible in evidence with a single stamp.[J.]]

Agreement between assured and underwriters requires but one stamp.

[[J.] The principle of these cases was recognised and acted on in the case of *Godson* v. *Forbes*, 6 Taunt. 171; 1 Marsh. 524, where, in an action brought on a policy of insurance, the question was raised, whether an agreement for a reference, made between the assured, (the plaintiff), on the one part, and all the underwriters who had subscribed the policy, on the other part, and the award made under that reference, were sufficiently stamped with a single stamp. It was contended, that these instruments required as many stamps as there were underwriters, being a distinct agreement and award as to each; but the Court held the single stamp on each to be sufficient. *Gibbs*, C. J., said—"We think it impossible to decide that, in the present case, more stamps than one were necessary, without disturbing decided cases. It was admitted by the counsel for the defendant, that, in a case of composition by an insolvent debtor with his creditors, only one stamp is necessary. There the different creditors have each a separate remedy against the insolvent debtor. They have no joint legal interest; yet it has been always considered, that, upon such a deed, one stamp is sufficient. Such deeds have always been received in evidence without objection; their legality has been acquiesced in on the principle, that all the creditors have a common interest in the joint fund. In the case of *Baker* v. *Jardine*, all the mariners in a vessel conveyed their interest in a prize to an agent. It was objected that they had each a separate interest, and that there ought to be as many stamps as persons interested. It was answered, 'It is true, that, when the agent has sold a prize, each, claiming his share, must assert his claim separately; but they have a community of interest in the joint fund, on the proceeds of which each is hereafter to assert his separate claim; and that community of interest enables them to convey by one deed with one stamp.' Another case arose on the subscription to the Bristol Dock, in which a number of persons had subscribed an agreement that each would subscribe the sum set against his respective name. This was an agreement by several for a subscription to one common fund. There it was held that one stamp was sufficient; because, though the parties might acquire separate interests, or subject themselves to separate obligations, yet all contributed to one loan, and therefore one stamp sufficed. *Burrough*, of counsel for the defendant, admitted that he could not distinguish that case from *Baker* v. *Jardine*. In the present case, the agree-

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ment is between the assured and all the underwriters on the policy. All have an equal interest in the matter insured, all being equally interested in the preservation of it; for, if it is preserved, none of them are liable. It is true, that, in a court of law, on the question, whether the assured had a claim on any one underwriter, his claim cannot be mingled with that of either of the others; but it is equally true, that all have an equal interest in the question of the liability. Here the parties agree to refer the question—What claims arise on the policy?—and this, we think, is such a community of interest, that one stamp is sufficient.[J.]

Several matters.

[[J.] So, in the case of *Allen* v. *Morrison*, 8 B. & Cr. 565; 3 Man. & Ry. 70, where all the members of a mutual insurance club executed a power of attorney appointing certain persons their attornies, to execute policies of the ships admitted into the club; by virtue of which they signed each policy with the names of all the members except the owner of the ship; it was contended, that, as it was a several power given by each member of the club, there ought to have been a separate stamp for each; but the Court overruled the objection. Lord *Tenterden* observed—"There was certainly a community of purpose actuating all the members of this club, viz. that each should be insured by all the others. And although it may, perhaps, be said that there was not an entire community of interest, that is not sufficient to make several stamps necessary.[J.]]

Power of attorney by the members of a mutual insurance club held to require but one stamp.

[In coincidence with the principle of the preceding cases, it has been held, that an indenture, by which an apprentice was bound for seven years, to serve A. B. for the first four years, and his own father for the last three, to learn two different trades, required one stamp only, the whole being one transaction. *The King* v. *Inhabitants of Lowth*, 8 B. & Cr. 247; 2 Man. & Ry. 273.[J.]]

As to stamp on indenture of apprenticeship.

[Of course, a several bond with one condition, applicable to all the obligors, is only liable to one stamp.]

[[J.] Thus, in the case of *Bowen* v. *Ashley*, 1 N. R. 274, (see also 6 Taunt. 171), where a bond was executed by six persons, binding themselves *severally*, and their several heirs, &c., in a penalty, conditioned for the regular attendance of the obligors at a certain musical society, each being bound for the attendance of the others as well as himself; it was contended that the instrument ought to have borne six bond stamps; but the contrary was decided. Sir *James Mansfield*, C. J., said—"We are of opinion that one stamp only is sufficient, and that this case cannot be distinguished from several other cases in which only one stamp would be

One stamp on several bond, with same condition, held to be sufficient.

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necessary. A common instance may be given, viz. where a debtor compounds with his creditors, and where each creditor signs the same deed, covenanting either to give further day of payment, or to take a certain sum as a composition. There, every covenant is, in fact, a separate covenant, and the several deed of each creditor who signs the deed; but the whole being only one transaction, a separate stamp for each person is never required. The same principle applies to this case. This was one transaction: it was not intended that one of these musicians should be bound unless all were bound; the engagement would never have been made with one of them, that he should perform by himself singly; but the binding of all of them to the same object was the consideration of the obligation entered into by each singly. We, therefore, think that only one stamp was necessary. It does not follow from this determination that persons may defraud the revenue by putting several bonds into one instrument, and with one stamp, as was stated in the argument. If that were to be done, and the persons who signed such bonds were severally bound, it would be a fraud; but here is no fraud."[J.] [So, an agreement by three persons, that, in consideration of A.'s discharging a debt due from B. to C., amounting to £200, with the costs, each of them would severally pay £50 and one-fourth of the costs, and give a bond, bill, or note for his proportion in the meantime, was held to require but one stamp. *Ramsbottom* v. *Davis*, 4 Mee. & W. 584.]

Covenant to indemnify surety may be contained in same deed as the covenant of both.

[J. It seems, that where two obligors execute a bond, one as principal and the other as surety, to a third person, and the principal, by the same deed, obliges himself to indemnify the surety against the consequences of this obligation, the whole may be included under one stamp. *Annandale* v. *Pattison*, 9 B. & Cr. 919; 5 Man. & Ry.J.]

Result of the cases.

[J. The general result of the cases, therefore, seems to be in favour of the exemption of the instrument from a plurality of stamps, where its various objects may fairly be considered as parts of the same transaction. They certainly do not afford a criterion exactly applicable to many instances that might be suggested, in which it would be extremely difficult to say whether there was such "community of purpose" as to bring the transaction within the allowed compass of a single stamp. It is probable that the Courts, in forming their judgment of any particular case, would be much influenced by the consideration, whether it was consistent with convenience and the usual course of business, that the transaction

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should be comprised in one deed; and it would not be safe to consider the preceding cases as authorising any conclusion at variance with either.[J.] [As to leases, see the cases cited *infra*, Vol. 4, p. 453.]

Several matters.

[Where a mercantile arrangement was proposed and accepted by letters passing between the plaintiff and the defendant's son, and the defendant afterwards entered into a guarantee on behalf of his son by indorsement on the son's letter, it was held to amount to one transaction within the proviso as to letters. *Burrough*, J., said, that that proviso was not confined to letters written by the same parties. *Stead* v. *Liddard*, 8 J. B. Moore, 2. See *Hemming* v. *Perry*, 2 Moo. & P. 375.]

[In the case of *Shipton* v. *Thornton*, 1 Per. & D. 216, a cargo of goods, part of which belonged solely to T., and part to T. and W., as partners, being in the hands of the consignee, T., on application for both parcels, signed an undertaking in the name of T. and W. to pay freight for them, commencing, "I hereby engage to pay," and the goods were delivered to him. The agreement was admitted with a single stamp in an action against T. for the freight, on his own parcel; because, though he could not bind his partner, he made himself liable for the whole, so that the contract was entire.]

Agreement for letting farms requires a separate stamp for each demise.

[J. Of course, where a landed proprietor enters into a general agreement with his tenantry for the letting of their respective farms, the terms of letting, except with regard to rent, being the same as to all, and the tenants' names are arranged in columns, with the respective rents set opposite to their names, the instrument operating as a separate demise or letting as to each tenant, requires a separate stamp for each; for the circumstance of the several agreements being contained on one piece of paper instead of many, cannot vary the construction or the stamp. *Doe* d. *Copley* v. *Day*, 13 East, 241. Indeed, no attempt was made to deny the liability of the instrument to several stamps in this case; the only question being, whether a single stamp, which had been affixed to the instrument, could be connected with the contract with the tenant against whom the action was brought, and near whose name it was placed, so as to render the instrument admissible as evidence of such contract; and the Court was of opinion, that, as the stamp had been recently impressed, and there appeared to be no dispute with any other tenant, it might be so considered. The obvious alternative rule in such cases, and which would prevail in the absence of evidence appropriating the stamp to any one particular transaction, would be to consider the stamp as applicable to the person *first* named; for, in a case where several persons have been admitted

Appropriation of stamp to particular transaction.

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to the freedom of a corporation upon one stamp, the admission of the person first named was held to be good, and that of all the rest to be void. See *Anon. case,* cited in *Gilby* v. *Lockyer,* Doug. 271.] [*Rex* v. *Reeks,* 2 Lord Raym. 1445, and *Powell* v. *Edmonds,* 12 East, 6, where a paper containing two agreements and one stamp was admitted to prove the agreement to which it appeared that the stamp related. If it is uncertain to which contract the stamp relates, neither will be admitted. *Ib.,* 1 Per. & D. 230. See *Waddington* v. *Francis,* 5 Esp. 182.]

[In the case of *Doe* d. *Phillips* v. *Phillips,* 3 Per. & D. 603, a deed of surrender of a lease in consideration of £120, and of a new lease to be granted of the premises at an increased rent, was held sufficiently stamped with a stamp of 1*l.* 15*s.*, although it was contended that the contract for the new lease was a distinct matter from the surrender. See *Doe* d. *Wheeler* v. *Wheeler,* 4 Nev. & M. 10.]

[An exemplification of letters of administration, containing an exemplification of other letters by way of narrative or explanation, does not require several stamps. *Doe* d. *Edwards* v. *Gunning,* 2 Nev. & P. 260; 7 Ad. & El. 240.]

Loss of unstamped agreement.

[If an unstamped agreement has been lost, no parol evidence can be given of its contents; for it is impossible to say whether the commissioners of stamps, in the exercise of their discretion, would have permitted the writing to be stamped on payment of the penalty. *Rippiner* v. *Wright,* 2 B. & Al. 478: *Rex* v. *Castle Morton,* 3 id. 588.]

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